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CIS

COMPETITION IN THE FEDERAL PROCUREMENT PROCESS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2127

TO REVISE THE PROCEDURES FOR SOLICITING AND EVALUATING BIDS FOR GOVERNMENT CONTRACTS AND AWARDING SUCH CONTRACTS, AND FOR OTHER PURPOSES

JUNE 29, 1982

Printed for the use of the Committee on Governmental Affairs

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COMPETITION IN THE FEDERAL PROCUREMENT PROCESS

TUESDAY, JUNE 29, 1982

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committee met at 10 a.m. in room 3302, Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee) presiding.

Present: Senators Roth, Cohen, Pryor, Rudman, and Levin.

OPENING STATEMENT OF SENATOR ROTH

Chairman ROTH. The committee will be in order.

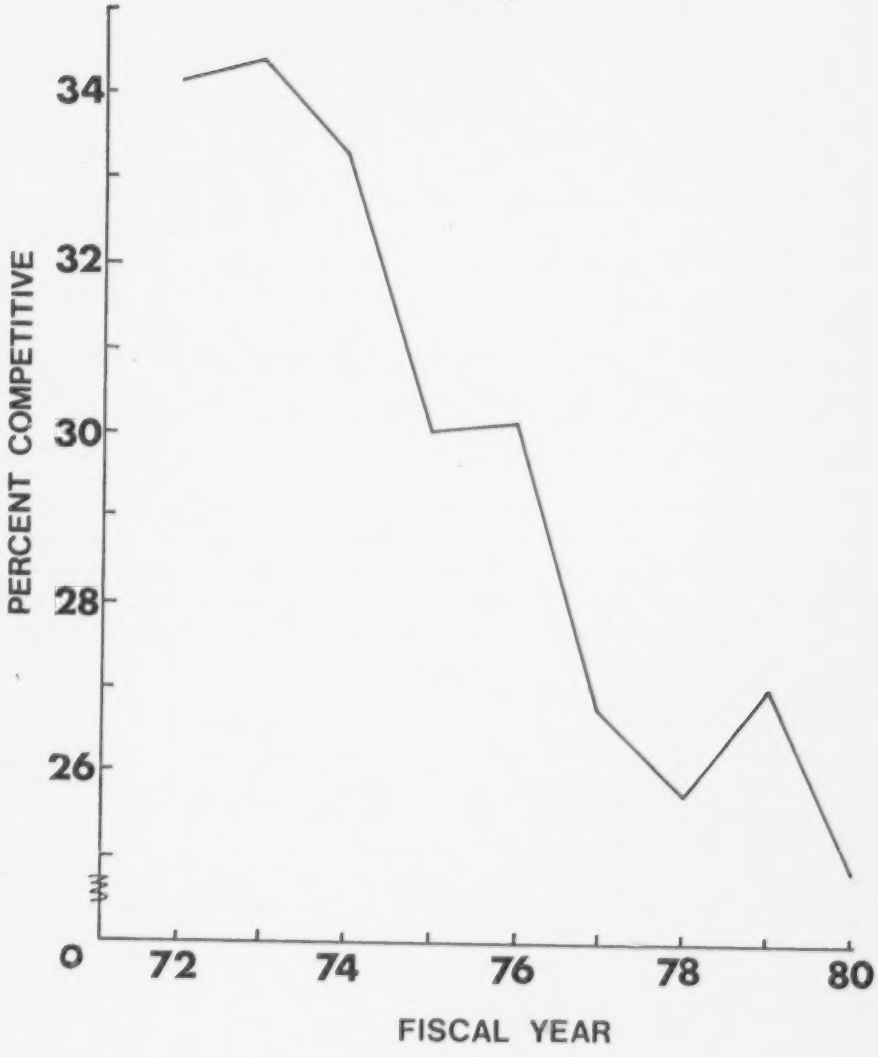
Today the committee convenes to consider the use of competition in the procurement process, especially in the Department of Defense. In particular, the committee will hear testimony concerning S. 2127, the Competition in Contracting Act that Senators Cohen, Levin, and myself have introduced. We will be examining the accuracy of Government statistics concerning the use of competition in contracting and the effect overly restrictive Government specification has on the competitive process.

Competition in the marketplace is a touchstone of the free enterprise system. Effective competition reduces the costs of goods and services, increases the number of goods available by encouraging more businesses, especially small businesses, to compete and improve product reliability. Real competition in the private sector also means better management and more efficient business operations as companies will do all they can to avoid unnecessary cost and waste.

Unfortunately, it is apparent that Government agencies too often fail to allow the competitive marketplace to help lower the cost of procurement. The most recent figures the committee has available, shown on the chart to my left, indicate that the percent of all contracts awarded competitively in the Defense Department based on price has dropped from 34 percent in 1972 to 25 percent in 1980.

[The chart referred to follows:]

TREND LINE
DEPARTMENT OF DEFENSE
PRICE COMPETITIVE PROCUREMENTS
(FY 72 - 80)



Chairman ROTH. This represents a discouraging drop of 25 percent of the number of price competitive contracts awarded by DOD. Frankly the civilian agencies appear not to have done much better. While I can understand that all contracts cannot be awarded on the basis of competition and exceptions are made available in the law, nevertheless I would expect the trend line to show a steady rate of increase. Somebody pointed out a professional skier would envy a downhill slope as steep as the trend line on the chart to the left.

The way things are going in this area of competitive procurement there is frankly no place to go but up. Just passing legislation to improve Governmentwide policies on competitive procurement is not the only answer. Government specifications and requirements guiding the particular procurements are often so restricted or outdated that only one firm can qualify to bid on the contract.

Prices for goods bought by the military using such specs are often much higher than similarly commercial available items. For example, the military has specifications for the purchase of Worchestershire sauce. The military specs on this sauce raise costs to over $10. Commercial sauce would cost only $8. Mil spec towels cost $1.46 while a similar towel in the commercial sector cost $1.12. Protected boots bought through military requirements were priced at about $18 as contrasted to the corner store variety at $15.60 a pair.

This must be the "What's My Line" school of procurement as the differences between military and commercial versions of such mundane items must be so minute that only by asking for the real mil spec representative to please stand up can anyone tell the difference.

I will not read my entire statement but ask that it be included as if read.

[Senator Roth's prepared statement follows:]

PREPARED STATEMENT OF SENATOR ROTH

Today, the committee convenes to consider the use of competition in the procurement process especially in the Department of Defense. In particular, the committee will hear testimony concerning S. 2127, the Competition in Contracting Act, which Senators COHEN, LEVIN and myself have introduced. We will also be examining the accuracy of Government statistics concerning the use of competition in contracting and the effect overly restrictive Government specifications have on the competitive process.

Competition in the marketplace is a touchstone of the free enterprise system. Effective competition reduces the costs of goods and services, increases the number of goods available by encouraging more businesses, especially small businesses, to compete and improves product reliability as bad products lose out in the fight for a share of the market. Real competition in the private sector also means better management and more efficient business operations as companies do all they can to avoid unnecessary costs and waste.

Obviously, Government is not business. We cannot expect Government agencies to allocate resources and manage their operations as if they were corporations because in Government there is no "bottom line," better known as profit. We have a right to expect, however, that when Government goes to the private sector to obtain goods and services, it will take advantage of the competitive mechanisms of the marketplace which are already there in abundance.

Unfortunately, it is apparent that Government agencies all too often fail to allow the competitive marketplace to help lower the costs of procurement. The most recent figures the committee has available, as shown on the chart to my left, indicate that the percent of all contracts awarded competitively in the Defense Depart-

ment, based on price, has dropped from 34 percent in 1972 to 25 percent in 1980. This represents a discouraging drop of 25 percent in the number of price competitive contracts awarded by DOD. The civil agencies do not appear to have done much better. While I don't expect DOD and the other contracting agencies to award all of their contracts competitively, I do expect the turned line to show a steady rate of increase. A professional skier would envy a snowhill slope as steep as the trend line on that chart! The way things are going in the area of competitive procurement, there is no place to go but up.

Effective competition in the contracting process can reduce costs, some studies say, by up to 30 percent or more. Yet, according to a study done by the Defense Science Board only 2 years ago, there has been "very little definitive evaluation by the Department of Defense on the real value of competition." Despite the fact that the most recent DOD quarterly weapons cost report shows a 50-percent cost increase over the previous quarter, the largest single increase in total costs for that report ever submitted, DOD has still found it impossible to open up its procurement process more fully to the competition process. Progress in the area of competition has been slow, almost like trying to swim through chewing gum. We must begin now to see real improvements in the level of competition because I firmly believe it is one of the best means we have of beginning to control the costs of weapons systems, major civil projects and even the purchase of everyday items like clothing and food for the military.

Just passing legislation to improve Government-wide policies on competitive procurements is not the only answer. Government specifications and requirements guiding particular procurements are often so restrictive or outdated that only one firm can qualify to bid on a contract. Prices for goods bought by the military using such "specs" are also often much higher than similar commerically available items. For example, the military has specifications for the purchase of Worcestershire sauce. In 1980, a case of "Mil-Spec" sauce cost over $10 while similar commercially available sauce cost only about $8. "Mil-Spec" towels cost $1.46 while a similar towel in the commercial sector cost $1.12. Protective boots bought through military requirements were priced at almost $18 as contracted to the "corner store" variety at $15.60 a pair. This must be the "What's My Line" school of procurement because the differences between military and commercial versions of such mundane items must be so minute that only by asking the real "Mil-Spec" representative to "please stand up" can anyone tell the difference.

The Competition in Contracting Act attempts to deal with these problems in the procurement process to stimulate real, cost-saving competition in Government procurement. We need good statistics in order to judge how effective S. 2127 is once it is enacted. Unfortunately, as Mark Twain noted "There are three kinds of untruth—lies, damn lies and statistics" and with the recent changes DOD has made in its statistical reporting system on competitive procurements, we'd be better off having the damn lies than the statistics. It appears that the figures on DOD competitive contracts have been inflated and we need to explore this issue today to ensure that the Congress receives credible figures on competition so that S. 2127 does not become an empty, unmeasurable reform.

I am especially looking forward to the testimony of the two small business contractors invited before the committee today. We need to encourage more participation from small businesses in the procurement process because they produce more jobs and are often far more innovative than larger firms and are more competitive than more established companies. The procurement system and our economy would both benefit from a greater small business presence in providing needed services to Government.

I welcome our witnesses today.

Chairman ROTH. At this time I would like to call upon Senator Cohen who has provided much of the leadership in this area.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you very much. I have a rather lengthy statement which I would like to be included in the record and perhaps touch upon the highlights of the legislation itself.

As you have pointed out, the Federal Government spends almost one-fifth of its total annual budget on the direct purchase of goods and services from the private sector. In fiscal year 1981 these contracts totaled over $134 billion. Despite the emphasis that we cur-

rently have on competition through formal advertising, however, more than half of the contracts awarded by the Government agencies are negotiated noncompetitively or sole sourced. That amounted to $72.2 billion last year.

Although as you pointed out competition may not be feasible in some circumstances, the GAO found that many of the sole-source contracts could have been competed. According to an April 1982 report, which examined six civil agencies' sole-source contract awards totaling $538.1 million, competition was feasible on an estimated 40 percent of those awards. Similarly in a July 1981 report on the Defense Department, GAO found that DOD failed to obtain available competition in awarding $289 million in the fiscal 1979 contracts which were sampled by GAO

A number of other studies have indicated that as much as 25 percent can be saved through increased competition. In addition to the increased savings, competition also will provide for better quality and strengthen the industrial base. The bottom line is that competition among suppliers is necessary to maintain the integrity of the expenditure of public funds by insuring that we have the best service at the lowest possible cost.

In the legislation, S. 2127, we have taken a new approach to Government contracting by distinguishing between competitive and noncompetitive procedures in lieu of formal advertising and negotiation. In this manner, competitive negotiation is put on a par with formal advertising—competitive procedures—and exceptions are provided to justify noncompetitive procedures. The legislation would expand the use of competition in Government contracting by permitting agencies to use the competitive method of formal advertising or competitive negotiations, whichever is most conducive to the conditions of the contract.

By placing competitive negotiations on a par with formal advertising we are recognizing that competition takes more than one form. The legislation will also impose greater restrictions on the awarding of sole-source contracts by shifting the emphasis from having to justify negotiated contracts to having to justify noncompetitive contracts. These new restrictions we believe will help insure that Government agencies award sole-source contracts only when they are truly warranted.

As a further check against sole-source contracting, our legislation would require that agencies, once they determine that a noncompetitive contract is justified, make one last attempt to obtain competition through a procurement notice. In the event that a contracting officer knows of only one source for a particular good or service, we feel this procurement notice will flush out the marketplace to find other potential competitors.

With that, Mr. Chairman, I would congratulate you for holding these hearings on this very important legislation.

Chairman ROTH. Thank you, Senator Cohen.

[Senator Cohen's prepared statement follows:]

PREPARED STATEMENT OF SENATOR COHEN

Mr. Chairman, I want to thank you for scheduling this hearing to consider S. 2127, the Competition in Contracting Act, which I have introduced to provide new

procedures to expand the use of competition in government contracting and impose greater restrictions on the awarding of noncompetitive contracts.

I am pleased to have the Chairman and Senator Levin, who have been leaders in the effort to reform procurement practices, as well as Senators Proxmire, Heinz, and East, as cosponsors of this legislation.

The Federal Government spends almost one-fifth of its total annual budget on the direct purchase of goods and services from the private sector. In Fiscal 1981, these contracts exceeded $134 billion.

Under our current procurement laws, formal advertising is the preferred method of procurement, with negotiation authorized by prescribed exceptions. Despite this emphasis on competition through formal advertising, negotiated contracts account for the vast majority of government procurement dollars. Negotiated contracts can be competitive—and our legislation recognizes and encourages competitive negotitation when it is the appropriate contracting method—but more than half of all negotiated contracts are now sole-sourced. These sole-sourced contracts are the ones that concern us.

According to figures compiled by the Office of Federal Procurement Policy, out of a total of $134.6 billion awarded by government agencies in fiscal year 1981, $72.2 billion was negotiated without competition. Although OFPP has not estimated the potential cost savings that would have been achieved had the government used competitive instead of of noncompetitive procedures, several studies have indicated that as much as 25 percent can be saved through increased competition. An Army study, entitled the "Cost Effects of Sole Source versus Competitive Procurement," found that the average reduction in the unit price of the major weapons systems sampled was approximately 54 percent. In any event, the savings promise to be substantial.

Outside of potential cost savings, competition in the procurement process generally provides for better quality. In some cases, competition may initially cost more, as in the dual-sourcing proposal advocated by Dr. Jacques Gansler, but the result is a better product and a stronger industrial base. The bottom line is that competition among suppliers is necessary to maintain integrity in the expenditure of public funds by ensuring that the good or service to be acquired is of the best quality at a low, if not the lowest, cost.

In our legislation, we have taken a new approach to government contracting by distinguishing between competitive and noncompetitive procedures in lieu of formal advertising and negotiation. In this manner, competitive negotiation is put on a par with formal advertising—competitive procedures—and exceptions are provided to justify noncompetitive procedures.

Recognizing that the exception, that is, negotiation, has become the rule, our legislation will first, increase the use of competition in contracting by permitting agencies to use the competitive method most conducive to the conditions of the contract, and second, impose greater restrictions on the awarding of noncompetitive contracts by shifting the emphasis from having to justify negotiation to having to justify noncompetitive procurements.

EXPANDING COMPETITION

The formal advertising requirement in present law is intended to keep the system honest and to assure "full and free competition." As long as the government is purchasing a common product (such as paper towels), formal advertising works well and is most appropriate. Formal advertising, however, may actually inhibit the government, in some cases, from taking advantage of the marketplace. Detailed design specifications are inherent in this method of procurement where price alone is the consideration for contract award. The result is that the base of suppliers tends to shrink to those few who manufacture to the unique government specifications.

Moreover, this emphasis on formal advertising results in excessive justification requirements for the use of negotiated procurements. If contracting officers need to consider factors other than price in making awards, or wish to have any discussions with prospective contractors, they must satisfy one of the statutory exceptions. For all practical purposes, competitive negotiation lacks recognition as a bona fide competitive technique.

In our legislation, agencies would be permitted to invite sealed bids or to request competitive proposals, whichever is most conducive to the conditions of the contract. Generally, the nature of the product or the service to be acquired and the marketplace circumstance will dictate the most effective method.

By placing competitive negotiation on par with formal advertising, we are recognizing that competition takes more than one form. Also, by eliminating the con-

straints put on negotiated contracts and all the attendant paperwork, we have lifted a great administrative burden off the shoulders of the Executive agencies.

RESTRICTING SOLE-SOURCE PROCUREMENT

To control the use of negotiation under the present statutes, Congress has required that its use be justified under of the 17 exceptions for the Department of Defense, NASA, and the Coast Guard, or 15 exceptions for the civilian agencies. Each exception, in turn, has subexceptions which provide many opportunities for the contracting officer to negotiate—competitively or noncompetitively—rather than to formally advertise. Our concern is that negotiated awards made without competition represent a much larger portion of the total procurement dollar.

Although competition may not be available for some government contracts, the General Accounting Office has found that many sole-source contracts could be competed. According to an April 1982 report, which examined six civil agencies' sole-source contract awards totaling $538.1 million, competition was feasible on an estimated 40 percent of the awards. Similarly, a July 1981 GAO report found that the Defense Department failed to obtain available competition in awarding $289 million in the fiscal 1979 contracts sampled by GAO.

During hearings on "Hurry-up Spending" held in the 96th Congress before the Senate Governmental Affairs Subcommittee on Oversight of Government Management, we also found an over-reliance on sole-source contracting. The Subcommittee determined that sole-source procurements were easily justified under the "competition-is-impracticable" exception. This exception is broad and particularly easy to invoke. In fact, we found that an agency's need to award a contract by the end of the fiscal year often became the motivation behind unnecessarily restrictive specifications that consequently made competition "impracticable."

Since the hearings, the Subcommittee has received two new Inspector General reports from the Departments of Agriculture and Energy on fiscal 1980 "hurry-up" spending. The USDA report found that time pressures at year-end curtailed competitive contracting in many cases. The Inspector General criticized procurement officials for using the justification of "expiring funds" in order to eliminate or shortcut phases in the procurement process—especially obtaining competition. According to the USDA report, 37 procurements totaling approximately $8 million were awarded at year-end through an abbreviated procurement process. The findings in the DOE report were similar.

To prevent unnecessary sole-source contracts, S. 2127 would establish only six exceptions to the use of competitive procedures. These new restrictions are the heart of the bill and will help ensure that government agencies award sole-source contracts only when they are truly warranted.

As a further check on unnecessary sole-source contracting, S. 2127 would require that agencies, once they have determined that a noncompetitive contract is justified, make one last attempt to obtain competition through a procurement notice. In the event that a contracting officer knows of only one source for a particular good or service, the procurement notice would flush out the marketplace to find other potential competitors. Limited exceptions to this procurement notice requirement are included in the bill.

Finally, to facilitate congressional oversight, S. 2127 would require agencies to maintain a file of all noncompetitive contracts which would include the contractor's name, the articles obtained, the dollar value, the reason for using noncompetitive procedures, and the position of the contracting officer who required and/or approved the contract.

Mr. Chairman, S. 2127 sets forth a workable solution to the sole-source contracting bill, and I hope that the Committee will support this important legislation.

Chairman ROTH. In keeping with our practice of recognizing Members in the order in which they appear, we will call next on Senator Rudman.

Senator RUDMAN. Thank you, Mr. Chairman.

I do not have an opening statement.

Chairman ROTH. Senator Levin?

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Mr. Chairman.

I congratulate you and Senator Cohen for pursuing this subject in this hearing today. I think that S. 2127 makes excellent sense. I am proud to be a cosponsor of it with the knowledge that the present law does not—that is; that there are two types of competition: formal advertising and competitive negotiations—and that the concern of Congress should focus not on agencies' decision to competitively negotiate but on an agency's decision not to compete a contract at all.

Competing a contract should be the extreme exception and the very specific exceptions to competition which are described in this bill will guarantee as best as statutory language can that noncompetitive procurements would be pursued only if really necessary. The bill also makes a great improvement in public notification of contractual actions. We will hear today from GAO that in 60 percent of the contracts awarded by civilian agencies that there is no preaward notice. Many of those failures are in violation of existing law. Probably most of those failures to put in a preaward notification are in violation of existing law.

I find that lawlessness by Government agencies is at least as disturbing as lawlessness by our citizens. The only way companies can compete is if they know about a contract and in many cases the Commerce Business Daily is the only way for small companies to become aware of Government contracts. The Senate Small Business Committee held 2 days of hearings on the same issue and the testimony of the small business witnesses was overwhelmingly critical of the notification provided by the Commerce Business Daily; testified that in most of the contract actions were not even listed in the Commerce Business Daily and that is what I have indicated above—60 percent.

They also testified that what was listed was frequently just a notice of sole-source contract. They testified that the contract descriptions were frequently insufficient, that the period of time for competitive responses was too short. In other words, by the time they received the Commerce Business Daily, read it, prepared a response, the contract had already been awarded. This bill would remedy many of these problems by requiring that all the very select contract actions be published at least 30 days before award in the Commerce Business Daily and that certain requirements be met for the content of the notice.

A similar provision as I have indicated, has already been included in the small business bill but just recently passed the Senate and a similar provision was added to the defense authorization bill, an amendment which Senator Cohen and I were able to adopt.

Finally I will mention a few words about sole-source contracts, an area of procurement that has captured my attention for the past several years. This bill will help minimize the use of sole-source procurement which narrow definitions for exceptions of competition.

According to the Defense Department's own figures, for instance in fiscal year 1981, 59 percent of all procurement dollars spent on DOD were awarded to contracts on a noncompetitive basis. When you combine this figure with the estimated 10 to 50 percent that can be saved through competition, one can readily see the sizable savings that can be realized through the reduction of sole-source

procurement. The GAO will testify today as previous reports have already shown that much of the present sole-source procurement is unjustified and unnecessary and this bill is a major step away from costly sole-source procurement.

Again I want to commend Senator Cohen for his excellent work in this area and to you, Mr. Chairman, for directing the full committee's attention and our resources to this very important subject.

Chairman ROTH. Thank you, Senator Levin.

I congratulate you on your interest and leadership in this area.

At this time we would like to call forward John Cibinic, professor of law, National Law Center, George Washington University.

TESTIMONY OF JOHN CIBINIC, JR., PROFESSOR OF LAW, NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY

Mr. CIBINIC. Thank you, Mr. Chairman.

Chairman ROTH. Mr. Cibinic, we welcome you here today and appreciate your interest. I would advise you, as well as all witnesses, that if you summarize your statement it will be included in the record as if read.

Mr. CIBINIC. I would like to do that, Mr. Chairman.

I would like to point out that as one of your later witnesses is going to testify, I do not classify myself as one of those consulting professors in the sense that I don't enter into contracts with the U.S. Government for the purpose of consulting with the Government.

I would like to congratulate the sponsors of this bill and the committee for holding hearings in this area, one of the reasons being that there have been many new procurement statutes introduced by the Congress. In the last 12 years I think we can probably count about five of them and all five have come to failure in the sense that they have not passed. I think the reason for this has been that there has been an attempt to do too much and too much novel in a given statute rather than to correct the problems that exist.

And in my view S. 2127 does not fall to those ills. It corrects the problems that have been clearly identified and it uses time-tested procurement techniques to correct them. I do not think that it will cause any great degree of disruption or any great problems as far as procurement agencies are concerned. I am sure that some of the witnesses today may have a different view on that point.

As to the desirability of competition, in my statement I come down to the bottom line by saying that the competition is essential even though it would save money, even though it will do a lot of other things, get good quality to the Government, it's essential because it assures source selection on the basis of fairness if it is properly carried out. It seems to me that both the citizenry and the competitors who deal with the Government having confidence that the Government is dealing fairly with them really is the bottom line as far as making our Government work.

I think that that is one of the base problems of the lack of competition. I must also say that some contractors are ambivalent toward competition. If they are the sole source, they don't like competition. If they are not the sole source, they love competition.

The need to limit competitive procurement is real. The present statutes do not say you shall not award contracts on the basis of sole-source awards. They are not prohibitory. All they use is a term "you shall" use maximum practicable competition. That hasn't worked. It is probably because everybody says, well, it is not practicable, we won't do it—a somewhat easy way to get out of it.

This statute does two things as the sponsors have pointed out. One, for the first time it lists specific reasons that you can use noncompetitive procedure and otherwise prohibits them at all levels. I think that would bring the message home to some people in the executive department rather than some broad language about practicability. The second thing it does, as Mr. Levin pointed out in his statement, is that it would, adopting the language that I suggest on page 5 of my statement, specifically announce the Government's intention to go sole source in advance.

I also suggest that the proposed source be identified so that if there is a person who said, well, I can supply the same thing, at least they have the opportunity to come in and make a try at it. They may not win but if the Government plays fair with them, the Government might learn something and the public might be better off as far as getting another source is concerned.

The affirmative duty to obtain effective and efficient competition is well spelled out in the statute. The statute does take a specific aim at another problem and that is Government specifications. Quite often the people who do the actual procurement, the contracting officers of the Government and the Government negotiators, have a specification handed to them. Then they are a prisoner of that specification. What needs to be done is that the people who draft up the specifications need to be told this is congressional policy. You shall draft the specifications so that you will get competition. S. 2127 would do that. It would require nonrestricted specifications, specifications which are best aimed to get competition, not only for competitive procurement, but it also would tell them to try to do this even when you have a noncompetitive procurement or when you go into small purchase procedures.

Why should you have nonrestrictive specifications when you have even a noncompetitive procurement? Very simple reason: The Government's prime contracts are just the tip of the iceberg. Quite often there are a thousand or more subcontractors under a very large prime contract and the noncompetition carries down into the subcontractor level when the Government uses restrictive specifications. So I think S. 2127 should clearly make certain that the requirement for nonrestrictive features in specifications doesn't apply only to competitive procurements but also to noncompetitive procurements as well.

The competitive procurement procedures, as the sponsors have testified, would in effect raise competitive negotiation on a level with formal advertising and use two different names, sealed-bid procedures and competitive proposals. I think that is appropriate. It would tell the procurement people: pick the one which will work best under the facts and circumstances. We have a lot of history of knowing which one will work best.

There are certain kinds of procurement where you cannot say the bid price alone is going to tell you who the best person for

award is. Then competitive proposals would be essential and necessary. I think that it would work very well in that area.

I have suggested some minor changes in language on page 8 of my statement. Also, in summary, I would like to point out that on the bottom of page 8, top of page 9, I counsel the Congress to adopt one statute, not two identical statutes. This may create some problems. I would rather not have a statute fail but I do think that the public would be so much better off if we had one statute rather than two identical statutes.

Senator COHEN. Thank you very much, Professor Cibinic. I first would like to thank you for your assistance in reviewing and making recommendations to our staffs for drafting this legislation. Given your extensive background in this field, what do you feel are the major reasons for the overreliance on sole-source contracts?

I might point out that you were very helpful during hearings held a year or so ago by the Oversight of Government Management Subcommittee on hurry-up spending.

I should point out now, too, that Congress has a measure of responsibility here. We can't point the finger at the executive branch and blame the agencies for relying upon sole-source contracts. In fact, Congress often appropriates money at the end of the fiscal year and leaves the agencies with very little time to conduct the type of competitive negotiations we are talking about. So no one should construe this effort as somehow laying the blame at the foot of the executive door.

We bear a large measure of responsibility ourselves. With that in mind, give us some of the reasons why we rely so heavily on sole-source contracting?

Mr. CIBINIC. I think the first one is a closed-mind attitude on the part of the Government officials responsible for drafting the specifications and the requirements. What I mean by a closed-mind attitude is that some of them believe they have identified an excellent product or somebody who is very dependable in giving us services. Why try someone else who might jeopardize our mission? Obviously when you place the executive branch in charge of executing the laws and accomplishing the mission, their judgment has to be respected. But I believe that that closed-mind attitude is present and I think that that is one of the major causes, whether it is based on not jeopardizing the mission or—well, I think this person is going to win the competition, so why should I devote my scarce time and resources to competing for the contract when I know this is the best anyway? That type of an attitude, I think, is pervasive in many of the Government agencies. I think that is one thing.

Running that a close second is the subject you mentioned—poor procurement planning.

Some of the executive agencies may have a problem as far as the number of people they have devoted to doing these kinds of things. They may have budget problems. I don't know. I do recognize that there has not been a tremendous increase in procurement planning in many of the agencies. It should be pointed out that they have had plenty of time to implement that policy since the hearings you held were, I believe, just about 2 years ago.

Senator COHEN. As a matter of fact, we found during the hurry-up spending hearings that there is no central plan for procurement

policy among the agencies. We found out, for example, that EPA had a fairly good procurement policy which was virtually unknown to the Office of Management and Budget. Frankly, I don't know what the status is for achieving some sort of uniform procurement policy among the agencies.

Mr. CIBINIC. There is a policy statement on the matter of implementation.

Senator COHEN. You may be aware that the Department of Defense has suggested that S. 2127 be implemented on a test basis. I would like to know whether, in your judgment, it would be either reasonable or necessary to do this on a test basis. Is there any reason why we couldn't go forward with the bill as it is currently written without waiting for a test period?

Mr. CIBINIC. The only thing that a test would do would be to spend more money and require hearings again. There are no novel approaches to the procurement procedures in S. 2127. Effectively what is described as the sealed-bid procedure in S. 2127 is very similar, if not almost identical, to the formal advertising procedures that are presently under statute in both the Armed Services Procurement Act and the Federal Property Administrative Services Act. And we have thousands of Comptroller General decisions and many court decisions and much regulatory material implementing those procedures.

And we know what they say. They have been litigated and they would not be changed significantly, if at all, by S. 2127. So why a modification there?

As far as the procedures for competitive proposals. As S. 2127 in its latest draft would indicate, that mirrors very closely what is now in the Armed Services Procurement Act but it has never been passed in the Federal Property and Administrative Services Act for civilian agencies.

So I don't see any need for a test. We know what the procedures are. Not everybody is happy with every little piece of every little procedure. However, for the most part they have worked very well and if followed by the procuring agency have resulted in very good procurement.

Senator COHEN. I think DOD is going to testify that some of the provisions of this bill will unduly burden the efficient operation of the procurement process. What is your reaction to that?

Mr. CIBINIC. If you are looking at this from the point of view of a totalitarian organization requiring someone——

Senator COHEN. Careful now. [Laughter.] It is going to be reported that you have accused the DOD of being a totalitarian.

Mr. CIBINIC. No. I would not say that. [Laughter.]

There is some problem there I am sure. No. I would just point out that if you would look at it from that viewpoint, any requirement that you do anything other than what you think is right under the circumstances is undue burden. And it limits your efficiency. There is no doubt that a person could run a competitive procurement with probably the greatest amount of efficiency if you would tear up all the statutes and all the regulations. But it wouldn't necessarily be very fair. And it wouldn't necessarily promise in the long run that the public would benefit with lower prices.

Senator COHEN. Just one final point. This bill sets forth the goal that competitive contracting should be effective and efficient. That is a change from the objective in the present procurement statutes which desire to obtain maximum and practicable competition. What is the significance of the change in your judgment?

Mr. CIBINIC. There are several aspects of the change. One of them, I think, I commented on before, maximum practicable hasn't worked. Will efficient work any better? I think that the aim is that there are some times when more is not better as far as the number of competitors on a particular procurement as long as you get effective competition. I have seen cases where there have been 300 competitors seeking to participate in the negotiated procurement for a research and development study. Now, in that type of a procurement, price is not the only basis for award. You have to do a considerable amount of analysis, and that takes an awful lot of time. It takes proposers time as well as Government agency time.

It doesn't help competition to have discussions with 300 offerors or anything such as that and, in fact, it would perhaps have a deleterious effect on competition. So effectiveness in competition deals with getting at the quality of competition. I might point out that there is another thing that is not necessarily specifically enumerated in the bill but which I see it would have an impact on and the fact is that it isn't only the move from noncompetitive to competitive. But to increase the quality of the competition once you get into competitive procurement. That is something we shouldn't lose sight of. Moving from zero competitors to one competitor is not necessarily good. Maybe under the circumstances you should move from zero competitors to five competitors and that may be very well. So that is what effective and efficient connotates. I think if properly implemented it would really have some very significant results.

I also would point out that passing the statute alone unfortunately is not going to cure the problems. You are going to have to make sure that someone effectively looks over the shoulder of the executive agencies and make sure that they are following these procedures. But for the first time you would have a base line upon which to charge then for improper activities.

Senator COHEN. Senator Rudman.

Senator RUDMAN. I would like to discuss with you briefly some testimony we are going to have presented later on in the hearing. I suspect that it will be very interesting. I don't know whether you are going to be present for the entire hearing, but some small manufacturers from the State of Georgia have submitted testimony. Essentially they manufacture office furniture on a contract basis for the Federal Government. These small manufacturers will claim, and it is my concern as well, that statutory preference is being created for the acquisition of commercially available products at first glance would seem to be the most equitable way to compete. But they will testify that in some ways this commercial products requirement will impinge on smaller companies who might be able to produce products at a more economical price than the Government could procure through the 10 largest steel office furniture manufacturers in the country.

The Government buys 1,000 desks. Maybe they would have to pay $700 apiece for those desks. Whereas if it was a contract specification without a statutory preference for commercially available products, it might be less expensive. How do you respond to that, Professor Cibinic?

Mr. CIBINIC. Senator, I think that the latest draft that I have seen of S. 2127 would not clearly spell out a preference for any type of specification. It would say use the specification that is best suited to the circumstances. Best suited to the circumstances is not always a performance specification. The performance specification or the functional specification would be the broadest specification that would allow the most things to compete. The commercial specification where you have off the shelf items is another type of specification. Sometimes the best specification for the circumstances is a design specification if you are dealing with a lot of small businesses for example. If you use a performance specification, quite a few small businesses will not be able to compete with the performance specification because they don't have the capability of designing a product. Should the Government design something and use it for competition? In certain cases, yes. I won't say in all cases. I am saying that Congress should not specify that you must use a particular kind of specification. Congress should say use the best specification under the circumstances and I think that that would cure the problem.

I can't say though that that manufacturer would be happy with the end result because it might be decided that a commercial specification was best all around in that circumstance. But it might be otherwise.

Senator RUDMAN. They raise a very interesting point. I looked at their testimony this morning. On another subject entirely, when you talk to the military procurement people you certainly get a sense that the industrial base in the country is narrowing and that in many cases they don't have the ability to go out and compete on a certain number of our specific major systems. For instance, certain types of nuclear submarines right now, have to be pruchased from one company. Certain kinds of guidance equipment we have to purchase from one company. Certain kinds of rockets and heavy launch equipment also purchased from one company, our tank program, a multibillion dollar program, one company, not because the Defense Department necessarily wants to do it that way but because in those cases essentially there is nowhere else to turn.

That raises a very interesting question as to whether or not we ought to foster through investment a wider industrial base. Would that investment in the long run get us more competition? I don't know the answer to that. But it is not as easy an issue as it first appears.

Mr. CIBINIC. No; I have had a lot of personal experience with that. When I worked in the Department of Defense I used to negotiate contracts for major weapons systems and airborne piloted weapons systems. The number of contractors who make those things has shrunk to probably as many as you can count on one hand and maybe even have a finger left over, and we had 12 to 15 competitors back then. We were still negotiating sole-source con-

tracts though. I used to negotiate sole-source contracts even back then.

The problem you point out though, the shrinking of the industrial base is a very complex problem. There are a number of procedures which interact in that area and a lot of improvements that could be made and I think that there are some of them that some of the agencies have begun to make in that area. It is a very complex problem. I think that competition requires that people work at it. It doesn't just happen.

In that area, in some of the Department of Defense programs they have used some innovative techniques like second sourcing, and things such as that, to create competition where none had existed. Whether they have done this for dollar savings or to keep the industrial base up, they are to be commended for it if they have done it in a manner that is efficient. I think some of those second sourcing programs have been very efficient.

Senator RUDMAN. They have also done some winner-take-all programs which have had the opposite effect if you want to compare them in terms of offset.

Mr. CIBINIC. You don't lock them in.

Senator RUDMAN. However, in terms of the economics certainly anyone who wanted to cry out against practices that limited competition would say that the winner-take-all programs have effect. So in the defense area which is one that I am particularly interested in because of the size of the dollars involved, I think it is a far more complex problem.

Mr. CIBINIC. It is not a simple problem. It clearly is not. I think they can work at it.

Senator RUDMAN. I agree.

Mr. CIBINIC. One of the reasons that I might point out for the reduced competition is there have been so many great big systems that they are buying very few numbers of units and they do not have the ability to diversify—the Navy used to have four or five aircraft in the fleet that would be their major carrier-borne fighter airplanes. They just don't have that kind of quantity. There is not enough to go around to keep a number of competitors operating. So it is a very complex problem.

Senator RUDMAN. Thank you very much.

Senator COHEN [presiding]. Before yielding to Senator Pryor, let me perhaps read for the purposes of the record here the exceptions we have established in S. 2127 and see how they would apply to DOD. We would require competition with the exception of these following circumstances. First, the property and services needed by the Government are available only from a single source and no other type of property or service will satisfy the needs of the executive agency. That is one exception where they can go forward on a sole-source basis.

Second, "The executive agency's need for the property or service is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures." That is another one that might have an impact upon DOD.

Third, "It is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the

United States or to achieve national industrial mobilization." Again, DOD might very well invoke that particular exception.

Fourth, "The terms of any agreement with a foreign government or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of property or services being procured for such government, have the effect of requiring the use of noncompetitive procedures."

There we have cost-sharing arrangements and agreements between NATO countries for example to procure particular weapons systems, which would preclude competition.

Fifth, "The statute requires that the procurement is made through another executive agency or a specified source." And sixth, "The disclosure of the executive agency's needs to more than one source would jeopardize the national security."

So in all of these exceptions it seems to me DOD would have some rather wide latitude to award contracts on a sole-source basis when justified.

Senator Pryor?

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Senator Cohen, thank you.

I would first like to commend Senator Cohen, and Senators Roth and Levin, for S. 2127. I would also like to commend my colleague, Senator Rudman, who, in the 2 years he has been in the Senate, has always been a strong advocate of more competition and more efficiency within Government procurement. Senator Cohen, I would also like to be added as a cosponsor, if I might, of S. 2127. I think it is certainly a step in the right direction. It is a movement I think we should take and I think it is certainly something that is going to be supported strongly, at least in concept by the Congress.

To supplement S. 2127, Senator Cohen, I am introducing this afternoon on the floor of the Senate a separate bill which I hope would not in any way take away or lessen the strength of this legislation but would in fact supplement and strengthen S. 2127. It would take accountability in the procurement process at least one step further. This legislation would require that an advocate for competition, an individual, to be appointed by each major procurement office that procures more than $25 million a year in hardware and services in any agency or department. I think that we find ourselves in the position at this time—Professor Cibinic I think touched on some of this—that really when it comes down to it we find no one is really responsible.

No one takes responsibility for the lack of competition. I am hoping that this legislation I am introducing on the Senate floor this afternoon will dovetail in with S. 2127 at the appropriate time, and strengthen this concept. I know that one of our witnesses to come this morning, I think, is going to advocate a competitive procurement advocate within GAO. I certainly have no qualms with that. I think everywhere we could have an advocate within every branch of our Government, is something that is necessary.

[Senator Pryor's prepared statement follows:]

PREPARED STATEMENT OF SENATOR PRYOR

Mr. Chairman, I am very pleased to see this committee's oversight activities in DOD mangement practices continuing. While considerable attention is devoted each year to Department of Defense funding and programs, too often insufficient attention has been focused on procurement activities which obligate the funds for the programs. Under your leadership, Mr. Chairman, the Committee on Governmental Affairs is actively undertaking this role.

Government procurement now totals in excess of $100 billion annually and must be considered one of the fastest growing accounts in the Federal budget. Chief among the spenders in this area is the Department of Defense and this hearing quite properly focuses on procurement by that department.

DOD will testify today and explain why its reporting of procurement statistics has been "misunderstood." Various businesses will report on the difficulties they have encountered in contracting with DOD. And all of our witnesses will comment on S. 2127, the Competition in Contracting Act of 1982, introduced by Senators Cohen, Roth and Levin. Without a doubt, government officials will tell us that we cannot legislate "good managment." My experience, both as a Member of Congress and a former Chief Executive for the State of Arkansas, is that management always benefits from good legislation, capable individuals, and clear accountability.

S. 2127 offers substantial improvements in the procurement machinery and procedure. It would provide meaningful reforms in the procurement process and I am pleased that it is before the Committee today.

I plan to introduce legislation later today that I think will supplement S. 2127 and take accountability one more step. The legislation will require that an advocate for competition, an individual, be appointed for each major procurement office. The individual will be selected from among procurement personnel, and his sole responsibility will be to ensure that his office is maximizing the use of competition in awarding contracts. He will be required to report to the agency head who reports to Congress on specific actions taken and improvements realized.

Accountability in achieving true reform through legislation, such as S. 2127, is essential if Congress is to have any real effect on procurement spending. Legislative reforms and improvements are too valuable to be lost in a bureaucratic shuffle. Accountability must ultimately reside with individuals. If history is any key to the future, absence of individual accountability could perpetuate the present system, rather than improve it.

Senator PRYOR. But a couple of questions, if I might, Mr. Chairman.

I would like to ask the professor, within your knowledge do you know of any contracting officer throughout the spectrum of the Federal system that has ever been disciplined for failure to maximize competition?

Mr. CIBINIC. No.

Senator PRYOR. We don't really have, then looking at it another way, an incentive for more competition—that might be one way to phrase that question. Is that correct?

Mr. CIBINIC. The way things have been going recently, there is probably a disincentive of it because of budget restraints. There are more things heaped upon the people to do and competition takes time and effort.

Senator PRYOR. Is there anyone then that would hold, or any part of our Federal procurement procedure that would hold accountable the procurement officers for maximizing competition within the procurement process?

Mr. CIBINIC. When you use the term procurement officers, I presume you are not referring just to the people who are contracting officers, who perform the function of conducting the competition, but you would also include in that the people who specify the requirements. I think S. 2127 goes about as far as I would feel comfortable in the statute, and that would require their identification. If that was an individual or was a person, or was a committee, the

committee, the individual or the person should be identified. For example, when somebody says we need to buy x number of F-15's, whoever made that decision and says we have to buy F-15's ought to be identified and if that is the committee, that committee ought to be identified and all of them should take that responsibility.

It may very well be that it is the proper decision, a perfectly justifiable decision, but what we ought to have is the person who specifies the procurement to be noncompetitive, ought to be identified, not necessarily just the person who carries out the order to do it noncompetitively.

Senator PRYOR. Do we have any existing guidelines—I know we have talked about some exceptions, to the procurement process—do we have any guidelines today that provide the contracting officers with the necessary input to determine whether or not competition is feasible? Where is that decision made, and how is that decision made?

Mr. CIBINIC. There are regulatory guidelines in this area. The DAR, Defense Acquisition Regulations, probably contains most of them and it tells them to use competition. It tells them to develop specifications and things such as that. And if followed appropriately probably we wouldn't have the necessity for Congress to pass a statute. The only problem is that I wonder if it has been followed enough and really comes home to the people in the procurement process. There are those kinds of things in the regulations. I don't think they go quite far enough. And I think that probably is one of the major reasons for having the statute.

Senator PRYOR. Thank you.

Senator COHEN. Don't we also have in that list of 17 exceptions one that is most frequently involved—the competition is an impracticable exception?

Mr. CIBINIC. Yes; impracticable to obtain competition is an opening that would seem rather small. But I think it is wide enough to drive a Mack truck through and a lot of people have already done very similar things in the past.

Senator COHEN. Professor Cibinic, thank you very much for your testimony.

[Mr. Cibinic's prepared statement follows:]

June 29, 1982

STATEMENT
OF
PROFESSOR JOHN CIBINIC, JR.

National Law Center
The George Washington University

before the

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

on

S. 2127, the Competition in Contracting Act of 1982, and Government Contract Specifications

Mr. Chairman, I appreciate the opportunity to appear before this committee and give my views on competition in Government contracts, the role specifications play in the process and the improvements which S.2127 would make. In the past, competition has been much like the weather. Everyone has talked about it but not much has been done about it . However, unlike the weather, something can be done about competition. S.2127 provides the opportunity for Congress to clearly spell out policies which will direct executive agencies to engage in effective and efficient competition.

The principal statutes dealing with federal procurement, the Armed Services Procurement Act of 1947, 10 U.S.C. § 2301 et seq. and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 251 et seq. have been on the books for almost 35 years. Since that time, we have learned much about competitive procurement but those statutes, which contain the principal policy guidance from Congress on procurement matters, do not

reflect this knowledge. As a result, there is often confusion in the executive branch over the need for competition and in determining the proper type of competition to be used. S.2127 would end this confusion and serve as a baseline to measure executive branch compliance. In my testimony I would first like to comment generally on competition and the benefits which can result from increased competition, then move on to specific problem areas and consider the solutions proposed by S.2127.

There are many reasons for competition and there are many types of competition. However, too often competition has been viewed only as price competition with a focus on potential dollar savings from increased competition. While it is undoubtedly true that, in many cases, significant savings can result from increased competition, this is not always so when viewed in the long run and when all costs of competition are considered. Competition cannot be accomplished without significant expenditures of time and money. First, there is the technical and administrative effort required to perform advance procurement planning, develop specifications, conduct market surveys and prepare solicitations. These expenditure can extend into the millions of dollars for a single major procurement. To this must be added the indirect cost of competition, the expenditures which competing offerors must make to take part in the competition. Again, these costs can be very large and it should be recognized that the cost per competitor must be multiplied by the number of competitors. Of course the Government does not pay directly for these costs but neither is there a free lunch here. Bidding and proposal expenses go into the overhead of contractors which is ultimately

paid by the Government in the prices of goods and services. However, the promise of cost savings is not the only, nor necessarily the major, reason for policies favoring competition in Government contracting. Properly conducted, competition can assure that needed industrial capacity exists, or that the best technical solution to the Government's problem has been selected. But probably more important than any of these reasons is the role that competition plays in assuring the public that Government procurement operates in a fair manner with source selection based on merit rather than favoritism.

Thus, while it is imperative that noncompetitive procurement be strictly limited, it does not follow that every competition be conducted in the same manner or to the same degree. S.2127 specifically addresses these issues.

The need to limit non-competitive procurement.

I am sure that others will testify to the extent of noncompetitive procurements awarded by Government agencies. Several recent audit reports issued by the General Accounting Office and numerous Comptroller General decisions clearly indicate an unacceptable level of unnecessary noncompetitive procurements throughout the Government. My own experiences confirm that effective and efficient competition could have been obtained in many noncompetitive procurements.

Under the present statutory scheme, the focus is on the distinction between advertising and negotiation. Apparently this was based on the assumption that negotiated procurement would be noncompetitive. The Armed Services Procurement Act was amended in 1963 to indicate that competition should be obtained in negotiated procurement. The Federal Property and Administrative Services Act never was so amended, similar requirements being adopted by regulation. However, these provisions merely state a preference for competition. Apparently, this has not been enough to deter the agencies from using noncompetitive procedures. S.2127 would for the first time make the award of a noncompetitive contract a clear violation of statute unless permitted under one of the specific and limited exceptions stated in the Act. These prohibitions would apply to both large and small purchases. Although some may contend otherwise, I believe that the exceptions are sufficiently broad to enable agencies to accomplish their missions but not so overly broad as to permit abuses. I would object to enlarging these exceptions to include a broad factor such as "impracticability" to permit noncompetitive procurement. However, a strictly controlled waiver procedure to be used only in unusual circumstances would not be objectionable.

S.2127 also requires a waiting period of at least 30 days before making the award. The intention of this provision is to allow offerors to furnish information to indicate that competition can be accomplished or to participate in the procurements. To make it more effective, I would

recommend that the notice required by § 303 (d)(e) to specifically announce the Government's intention to make a noncompetitive award and identify the proposed source. Since this notice and waiting period adds a considerable burden on the executive agencies, I support the limitation of these requirements to other than the small purchases.

Affirmative duty to obtain effective and efficient competition.

S.2127 goes further than merely prohibiting noncompetitive procedures. § 303(a) specifically requires the executive agencies to make an affirmative effort to obtain effective and efficient competition. Thus agencies are required not only to obtain competition but to increase the quality of the competition. This is necessary in view of unsatisfactory agency past performance. Opportunities for obtaining or improving competition have often been lost because of untimely, faulty or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications or to perform adequate market surveys and identify potential sources. Some agencies have already implemented some of these reforms, but there are many opportunities for improvement. By requiring effective competition Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute. The requirement that the competition be efficient recognizes that the costs of the competition should be justified by the benefits to be received.

Specifications.

Specifications are the cornerstone of competitive procurement. Many noncompetitive procurements result from specifications which require the products or services of only one source. In addition restrictive, outdated, defective or otherwise improper specifications often reduce the effectiveness of competition either by reducing the number of competitors or by serving as a basis for claims during the performance process. The reasons for these improper specifications vary. In a few cases, bias or favoritism is the cause. In many others, it is ignorance of the proper role and nature of specifications or the lack of sufficient capable personnel to develop appropriate specifications. § 311(a) would command the agencies to correct these practices and to use specifications which would enhance competition. It also recognizes that there is no one specification which is ideal for all situations but that the specification type should depend upon a combination of market availability and Government needs.

As drafted, § 311(a) would apply only to sealed bids and competitive proposals. I recommend that appropriate language be adopted making these requirements also applicable to small purchases. I do not believe that this would create an unreasonable burden on the agencies.

Competitive procurement procedures.

Use of the improper procurement procedures has often resulted in

reduced competition or increased costs. Experience has shown that the of competition in given circumstances depends upon many factors, including Government needs, type of specifications, market availability, number of competitors, available item and size of procurement. Under the present statutes the only guidance on procurement procedures is that formal advertising is preferred. S.2127 would remedy this situation by requiring the agencies to use the competitive procurement procedures most suited to the circumstances of the procurement. It would also do away with the necessity for the preparation and review of determinations and findings. The elimination of this non-productive effort which has grown largely into a matter of form should result in some savings.

S.2127 establishes three major types of competitive procedures and gives the criteria which would require the use of each method:

a. Sealed bids

b. Competitive proposals

c. Simplified small purchases

S.2127 also specifies minimum procedures to be followed for sealed bids and competitive proposals. These procedures are almost identical to those which are presently required for formal advertising and negotiation. These procedures are presently implemented by procurement regulations, are well known to most procurement officials and the contracting community, have

been interpreted by many court decisions and thousands of Comptroller General decisions. For the most part, they have proved to be workable without imposing an undue burden on either the procuring agenices or the contracting community. I would not favor significant modification of these procedures. The disruptions which would probably occur in implementing any significant changes and the increased litigation and controversy which would surely result would not justify any anticipated gains. I favor S.2127's application of these procedures only to non-small purchases. I believe that the increased cost to the executive agencies and the great burden that would be placed upon offerors, many of whom would be small businesses, would be counterproductive. The costs would by far outweigh any possible benefits. It should be noted that small purchases are not exempted from the requirements for competition.

There are some minor changes which I would suggest be made to the language in § 312(d) which would make its procedures conform more closely to present procedures. On page 5, line 34 change "may" to "shall;" on page 6, line 1 add "and may make award" after "proposals;" on page 6, line 2, change "with" to "following;" on page 6, line 5 add "beyond minor clarification" after "offerors;" on page, line 6 change "evaluation with" to "award after;" on page 6, line 11, change "evaluation" to "award;" and on page 6, line 13, add "subject to minor clarifications" after "received."

In summary, I strongly urge the adoption of S.2127. It will make needed improvements, provide a sound basis for continued development of competitive procedures and can be implemented immediately with a minimum of cost. However, rather than having two identical statutes, one for the Department of Defense and one for the civilian agencies, I just as strongly urge that the act be implemented through a single statute. There is no reason for the statutes to be separate if they are identical, and there is no reason for them not to be identical. Dual statutes will result in increased costs in the future as they have in the past and continue to burden the procurement process.

Senator COHEN. Two witnesses will testify next, Mr. Constantine Polites, president, Constantine N. Polites & Co., Yeadon, Pa., and also Mr. John M. Cockerham, president of Cockerham & Associates, Huntsville, Ala.

TESTIMONY OF CONSTANTINE N. POLITES, PRESIDENT, CONSTANTINE N. POLITES & CO., YEADON, PA., AND JOHN M. COCKERHAM, PRESIDENT, JOHN M. COCKERHAM & ASSOCIATES, INC., HUNTSVILLE, ALA.

Mr. POLITES. Thank you, Mr. Chairman.

My name is Constantine N. Polites, owner of the small manufacturing firm of same name and we manufacture a type of material called scaffolding couplers, scaffolding tubing. These are components used to create scaffolding for the shipbuilding and nuclear power industry.

S. 2127 under discussion indicates an increased interest in maximizing competition in Government procurement. However, it lacks certain safeguards against abuses which may occur when an agency attempts to accomplish its mission in the most expeditious manner.

I have encountered what I feel are abuses of the Government procurement system originating at the operating level and in effect supported by the agency head. My experience has been with the Navy. All attempts to address the subject of competition have been met with nonresponsive comments as indicated in letters submitted to the committee.

The following are specific problems which I have encountered and which limit competition.

First, and most important, specifications which provide for access of only one commercially available product. By this I mean an illegal form of sole source.

Second, classification of an item as proprietary, when several commercially available products were available with equal or better performance characteristics.

Third, listing an item as a manufacturer's replacement part, with a replacement part number instead of a specification.

I would like to propose to the committee the following remedies to be incorporated into S. 2127.

First, all solicitations made on a competitive basis should provide access and emphasis—access—for at least two commercially off the shelf items. The burden should be on the procuring activity to incorporate language broad enough to accomplish this.

Second, a vendor's advocate for competition should be established within the GAO to assist firns in achieving competition.

Third, where noncompetitive procedures are used, Congress, through the GAO should have the option of reviewing solicitations and procurements, and ultimately determining an agency's true needs to achieve competition.

I have been going through this offering process to the military since 1974. At times we have sold our material to them. At other times have had the development of a specification which we advocate through the GAO and which we achieve through the GAO, the

specification was so written that only one commercially available product could have access.

In the products that I will show you, there are only two manufacturers in the world, ours and another competitor. Both are used in the specialized sector of the power and shipbuilding industry. Both have similar standards. Ours perhaps in its own way has certain qualities which are preferable to the power industry, higher safety standards. The other is also an acceptable product. However, the specification as it was written and despite a lot of comments from us excluded ourselves in this particular commodity and in another size where there is even broader competition, it excluded all the other competitors.

For the sake of visual contact, I brought some of these samples so we can see what we are talking about.

Without seeking any publicity, this is the product which we offered to the military. These are couplers, simply couplers binding tubing together. We went in on the competition about 4 months ago.

Senator PRYOR. Was this with DOD?

Mr. POLITES. This was the Navy.

Senator PRYOR. By the way, do you have the letters that you make reference to in your statenent?

Mr. POLITES. Yes.

Senator PRYOR. I would be very interested in seeing that.

Mr. POLITES. I have responses from Mr. Layman's office which are effectively nonresponsive, but we have had very polite but really no answers. They are filling words on the paper. They are very polite, but they don't address the guestion whatsoever of the competition.[1]

I might pursue on that. With this particular offer, with the product that we offered, we exceeded OSHA requirements by 100 percent and $7,000 lower than the award, we were deemed nonresponsive. We knew that, but we still submitted it.

Senator COHEN. Could you go back and start from the beginning so we have some sort of historical context?

Could you start from the beginning and tell us how this came about, what you did? Did you get a solicitation from the Navy? Did you respond to the Navy?

Tell us the history.

Mr. POLITES. In 1974, we were aware of a particular sector that needed this particular product; in other words, this is a particular size used by the military, the east coast shipyards and certain major power contractors.

One power company is our prime and we make it almost to their specifications. I say "almost" because we have improved even upon that. We developed this. We went through a series of modifications to achieve the maximum strength on this particular item.

There were usually a series of solicitations with locally made specifications by each shipyard. Each time in some form or other they wrote some quality which did not exist in our product.

So, of course, we became nonresponsive. We would file several GAO protests and four or five, I believe, decisions by the Comptrol-

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[1] See p. 119.

ler General on this subject. The problem is that the agency has the ultimate answer in deciding what its needs are.

All it has to do is simply gives its justification for a particular quality and GAO will say it is not restrictive. We found out that the specifications were not restrictive, I mean there was nothing in the specification which prohibited a manufacturer from making that. That was the answer ultimately.

In other words, if we made it exactly the way the specifications were written, it would be fine. It would comply. But this is an off-the-shelf item and the objective here is competition and producing a product at its lowest price and its most efficient fashion.

If we produced what was in the specification, we would reduce our quality, our performance characteristics from what OSHA requires of a minimum of 3,200 pounds in slippage capacity, to what my competitor claims to have, of 2,500 pounds.

Senator COHEN. What you are saying is you have a product that is higher quality and a lower price, than your competitions' product, and yet because the specification was restrictive, you were effectively cut out of competition for the contract, which was subsequently limited to one source.

Mr. POLITES. It is the effective legal sole source. That is what it does. I have written to Mr. Layman's office and again you have copies of the correspondence.

At no point do they want to address the subject of competition. I said at least get two firms. If you cannot get one, if you don't like our product, at least—there are two other people in a different category, I should say. They are still scaffolding couplers. They could be soap or shoelaces. At least get some competition in the place.

I have never received an answer to that subject of competition. I have four letters that went to the Secretary. Nowhere is that word mentioned. I have phoned then, got beautiful stonewalling back but no response to that subject. But the most important thing I would like to indicate is this question of forcing a particular agency to require some competitive access, for competitors, not just writing it out and after the solicitation goes out trying to get competition. That is what is being done now. But forcing the specification writer really to incorporate it into it.

Later, by having someone looking over the agency's neck, to really determine, are they in fact carrying out your wishes to obtain this competition.

Right now, there is no one. You can go from the operating level right straight through to the Secretary's office and no one wants to assume responsibility for anything like that.

Senator COHEN. Do you have a couple of more products?

Mr. POLITES. I have these things. Just for the sake of comparison, I also brought the competitor item which I will not mention their name, but it is part of your record. This is the difference. One has a hinge on one side; if you look at it in this fashion, and this has a hinge on the other side. This has a capacity of, according to our test results, in excess of 6,000 pounds, this according to the manufacturer has a capacity of two-and-a-half thousand pounds. These are all published record.

Senator PRYOR. What was the amount of the contract?

Mr. POLITES. In this case, you have copies of the correspondence. $54,000 was that particular contract, and we went in at $47,000 for what effectively would be hammer and nail items. You have rather noncompetitive specifications here.

Senator PRYOR. Let's assume that your competitor got the contract. He is going to make, what do you call those?

Mr. POLITIES. Scaffolding couplers.

Senator PRYOR. Your competitor got the contract. What are the chances of you ever getting that contract from the Navy Department away from your competitor? In other words, is he basically locked in from here to eternity for that particular contract?

Mr. POLITES. If the answer is, if I can produce that particular item exactly the way the specification is written, I can easily submit a responsive offer. And the chance would be under those circumstances very reasonably. There would be no difficulty. But that would mean tooling up to a completely different product which has its sole application from our business point of view only for the Navy because we wouldn't be selling to any of our commercial customers because it doesn't meet their requirements.

Senator PRYOR. Where does the small businessman in America today who wants a contract with the agency "X"; where does that small businessperson turn to in the situation where he or she feels that they are an aggrieved party in the contracting process? You don't call the Secretary of the Navy?

Mr. POLITES. No. To the best of our knowledge, the approach we took, is direct it to GAO if we felt the specification was restrictive.

Senator PRYOR. Thus comes your recommendation for advocate within GAO?

Mr. POLITES. Yes. That was our only recourse because within the agency everyone was effectively looking the other direction.

Senator PRYOR. What about if there were an advocate's office within the Department of Navy that you could go to and say, all right, Mr. Advocate, you are here to advocate for competition and I am here to say that I am the aggrieved party, I want you to help me.

Would that have helped you or gotten someone's attention?

Mr. POLITES. If he went to Mr. Layman's office and we didn't get any satisfaction or didn't get a responsive comment, I don't think within the agency that that would be the answer. I think it should be outside of the agency, an independent organization.

I feel the GAO has done a superb job within its area of responsibility. I think that that is where you should have the——

Senator PRYOR. I must say that everyday I say thank God for the GAO. I don't know where we would be without them.

Mr. POLITES. I think they do a terrific job.

Senator COHEN. Mr. Cockerham?

Mr. COCKERHAM. Thank you.

I am John Cockerham, of John M. Cockerham and Associates, Huntsville, Ala.

I am in a business that specializes as far as the defense sector is concerned in the area of engineering and technical services and computer services. We provide business consulting to the private sector. We also have wholesale and retail building materials for hardware and construction companies.

We are a small business.

I worked 6 years as a civil servant for the Army and since, I have worked 10 years in the business sector. My specialty is in acquisition planning, cost analysis, and what we call production and cost risk analyses in the defense sector.

You asked me to discuss a number of problems of small business dealing with the Government's procurement process and how the use of Government specifications in the contract might affect the competitive process.

It is not possible in the short time I will spend before you to adequately address either of these issues in an analytical fashion. Therefore, from by experience, I will enumerate some observations and a few problems for your consideration. More indepth discussion is reserved for those areas of interest indicated by your questions.

The most severe problem we encounter is the time required for the Government to procure. Our industrial clients typically require from 1 to 15 days to procure, whereas, the Government requires from 2 to 9 nonths to procure the same services.

It is not uncommon for the Government to take from 1 to 2 years. This problem alone causes numerous other problems for the businessman in the marketplace. The lack of financial, manpower, and cash flow information makes planning useless and banking a nightmare. Our Government customers continue to seek larger and longer contracts which makes the small businessman's marketplace ever smaller.

Large systems integration, construction "Turnkey," and "Bodyshop" support-type operations continue to flourish. We have learned that having a contractual vehicle is supreme to technical excellence and cost-effective work.

Reducing the time for procurement would allow more and smaller procurement actions, thus greatly increasing the competition and participation from small business. I can assure you that if Congress applies pressure, the average time to procure goods and services can easily be reduced from 30 to 50 percent. The result would be a very significant stimulation to the competitive market.

More specifically, a list of a few procurement problems follows:

One, preaward surveys are often meaningless, time consuming and costly for the Government and the contractor. Before authorizing a preaward survey the Government should have a specific reason. I recently asked for such a reason on a particular contract and there was no answer, except that it is customarily done. In other words, it is customary to hold up contracts for weeks and perhaps months for no reason.

Two, there is excessive time for the evaluation of proposals. My best example is a competitive RFP with the Office of Naval Research that took 322 days for the Navy to respond to our proposal on a job to improve the acquisition process. This was a major proposal effort for our firm with the result that we have not bid another job at ONR for 6 years. The sad, but comical aspect is that we were bidding on a job to improve the acquisition process.

Three, contractors are forced to accept the wrong type of contracts. In our case, we have been forced by Army and Navy procurement officers to accept cost plus contracts in lieu of fixed-price contracts where the cost was the same or less for the fixed-price

effort. We prefer fixed-price contracts to avoid lengthy delays in final payment under the contract, which is the next item of consideration.

Four, there are grossly excessive delays in closeout audits under cost plus contracts. These delays in turn delay our final payments and rate adjustments. Closeout audits are the lowest priority for DCAA when the Government owes the contractor money. Recently, it took 10 months for us to collect $21,500 and 2 years to collect $13,000 from the date of our final invoices.

Five, there is no effective way to purge our industry and Government from the fraudulent abusers of the system. The bid protest procedures are a joke and should be the topic of one of your future hearings. In addition, to speak out publicly severely jeopardizes the future of any size business.

Two years ago I was interviewed by a newspaper concerning my views on Department of Army policies. I was admonished for my actions by the chief of procurement of a major Army Command and over the next months was educated in the ways of the silent power of the bureaucracy.

The procurement and legal elements in the Government have the unquestionable power to encumber the system to the advantage and disadvantage of a particular contractor. Except on rare occasions, you cannot expect candor from any size firm in the defense industry. Corporate risks far outweigh any benefits that result in trying to improve the system.

Six, corporate progression to higher business plateaus is very difficult. Obviously if small business is to compete with large industry, the small business must grow and expand into the competitive marketplace.

It is very difficult to pledge performance or present ideas greater than your corporate history to the Government, in a legitimate fashion, and still end up with the business. In industry we frequently give discretionary moneys to a new supplier on the calculated chance that the new supplier will deliver and provide good competition on larger efforts in the future. This is a use of sole-source contracting to increase competition.

The valid application of the unsolicited proposal and the sole-source contract should not be abandoned in the attempt to curb the abusers within the Government and industry. The abusers can just as easily fix contracts through contract specifications to virtually assure award of contracts in the so-called competitive process.

Seven, there are major business and operational surprises from legislation and, worst of all, ill conceived administration policies. The latter is not as severe a problem now since the Reagan administration was late in making political appointments. However, in 1984, I predict that many of the now silent appointees in the Department of Defense will begin to make policies that will purge the ranks of the new and small business competitors.

For such a serious matter, I feel that I must provide specific testimony. In the 1980 election year, the top Army appointees issued a moratorium that in one day stopped all of our new business. The administration then encumbered the procurement process with thresholds that ultimately required lengthy review and approval for any service contract in excess of $25,000.

Later, minorities and universities were excluded from this action by the Carter administration which in fact consisted largely of key appointees from the minority and university sectors.

The Reagan administration refused to take any action to remove these sanctions and certainly many small businesses must have quietly failed. This was a particularly dark period in our corporate history from which we have yet to fully recover.

Eight, the use of dollar threshold constraints in procurement is costly and time consuming for the Government.

The commercial sector often uses dollar thresholds to key top management's attention in the decision process. However, in the Government, dollar threshold constraints for higher level approval or for detail justification, simply encumber the system.

With a $25,000 threshold constraint, a $100,000 effort requires four contracts actions in order to avoid the threshold. Obviously, this is four times the workload on procurement which increases the time to procure, which is the reason the threshold was avoided in the beginning. No matter the threshold amount, this is a common practice which is still faster and more efficient for the Government. The time delays to properly go through the channels are exorbitant. To be specific we just received a $200,000 contract that took 13 months to process largely due to higher level approval requirements.

I believe that in many cases the cost to process the contract exceeds the value of the contract. I have never understood why the Government pays for a colonel and his staff to write detail justification to another colonel and his staff, travel, meet, and pass paper for months in order that the second colonel can initial what the first colonel is doing.

S. 2127 uses a $75,000 threshold in an apparent attempt to curb sole-source contracting. S. 2248 uses a $100,000 threshold for the same purpose. I assume the authors of this legislation are attempting to limit the misuses of the sole-source method of contracting, but recognize there are still very valid and effective uses of noncompetitive procurements.

If this is true, the intent is honorable but the results will have the opposite effect. The legitimate contractors and Government customers will be further encumbered while the abusers simply short circuit the competitive process through tailoring the contract specifications.

It is my opinion that from 50 to 80 percent of all competitive contracts are predetermined to some degree. It is a rare event to read an announcement in the Commerce Business Daily and then to bid and win the contract. In my 10 years of business, I have never won a contract in this manner. To require a longer duration for announcements in the Commerce Business Daily is a severe time penalty for good intent but without practical purpose.

Nine, there is undue protection in the marketplace of minority firms, universities, nonprofit institutions and consulting professors. Why not place sales thresholds on these groups? Is it not enough that for universities and professors we pay through our taxes for their facilities, equipment, and administrative support? Is it not enough that 8A firms have gone far beyond their competitors in sales, yet still receive protection in the marketplace?

Nonprofit institutions should have no protection in the marketplace, since having no profit should make such firms more cost competitive. S. 2248 completely excludes all nonprofit institutions from all constraints on sole source contracting. This action insures hundreds of millions of dollars to flow from the competitive market straight to the nonprofit centers.

In regard to Government specifications and the effect on the competitive process, I can assure you that contract specifications are often used to predetermine the outcome of a competition. This is easily done and very popular. There are numerous examples, but the best I have encountered was with the Corps of Engineers on a housing project in Hinesville, Ga.

There was a contractor currently building homes at Fort Stewart that knew all of the specifications, had full knowledge of the new site and requirements and possessed adequate performance bonding.

The Corps of Engineers competitive contracting method was to give anyone the opportunity to bid this job that could design the homes, the streets, the storm sewers and drainage system, and the utilities for 200 homes; that could get quotes on materials and from subcontracts; that could get bonded for $10 million;. that could spend $75,000 on plans; and that could submit a full competitive proposal in 2 months.

On one point only, it takes 6 months as a minimum to get bonded. The Corps of Engineers would not accept a cash bond to cover contract liability nor reduce the size of the project. Therefore our firm, which owned a local builder's supply, had excellent liquidity and five builders that have collectively built over 1,000 homes, could not bid the job.

It would have been such smarter for the corps to literally have given us 50 homes to build in order to introduce competition to the area. It was projected another 1,000 to 2,000 units would be constructed in eastern Georgia.

The corps wonders why only one contractor bids their honest and open competitive contracts. My firm does not plan to bid another job for the Corps of Engineers.

The altering of work scope specifications, contractor requirements and/or evaluation criteria to the advantage or disadvantage of a particular contractor is commonplace. It is done consciously and unconsciously through a system in the bureaucracy that virtually guarantees the perpetuation of this problem.

In the Department of Defense the procureuent branch, the legal department, the project manager, the project manager's staff and the Conmodity Commander share the irresponsibility. In my opinion, there is no accountability and the greatest of these offenders are the procurement and legal sectors that have created empires more powerful than the people and programs they are designed to support.

The problem with specifications is only one variable intertwined in a system of management that simply does not work. I do not believe that this matter can be addressed independently by legislative or management methods.

The Government is an undisciplined system of business where individual responsibility is neither identified nor rewarded nor penalized commensurate with achievement.

To achieve discipline on a broad basis requires a depth of knowledge, dedication and boldness in restructuring government business that has not been demonstrated, not even by two administrations dedicated to that purpose.

Short of that goal, those of us that wish to improve matters are only left to tinkering with the system. I do not believe that you can legislate good management, but if legislation must be passed I hope that the statutes will reflect careful study rather than frustration with the system. In this regard, I ask Congress to avoid unnecessary threshold constraints, loopholes for certain sectors of business and further encumberances to the procurement system.

Furthermore, I suggest Congress use an avenue of management discipline to achieve improvements in the system. This can be accomplished by holding political appointees more accountable. These jobs are high callings to serve our country and are the bridges between the Government and industry. These appointed positions should implement congressional policy with the consistency and stability necessary for businesses to operate efficiently without continual surprises.

Congress can aid this process by expressing achievable policies and desires more precisely. For example, if Congress wishes to reduce the acquisition time, increase competition, reduce corporate overhead and increase government manpower productivity, then task the administration in DOD to reduce the average time to procure goods and services by 30 percent in 1 year. Furthermore, if Congress wishes to purge abusers from the system, then task the administration to establish internal contract review boards that will constructively review and take internal action as necessary in response to legitimate contractor complaints;

Although I have presented only a few problems and recommendations, there are numerous actions that can be taken to improve the business of Government. Government business will never duplicate the commercial sector; however, I do not choose to give up on the pursuit of those principles embodied in the free enterprise system.

I remain of the persuasion that things can be better if Congress and the administration are jointly committed to that purpose.

Mr. Chairman, I applaud the actions, concerns, and demonstrated willingness of this committee to become involved with the difficult task at hand.

Again, I appreciate this opportunity and always welcone your invitation to be of service.

Senator PRYOR. Thank you, Mr. Cockerham.

Senator Cohen had to step out of the meeting for a moment; he shall return in a second.

I would like to ask a couple of questions.

You state in your opening remarks that you have not been successful in obtaining Governnent business by reading the Commercial Business Daily and then doing what is required under the proposed solicitation that they set out for that particular contract.

How do you get Government business if you don't do it this way? What is the system that you use or how do most small businessesmen do it?

Mr. COCKERHAM. I think most small businessmen operate conceptually the same as the large. We stay in the marketplace; we know the customer, we know what procurements are coming out.

We read the Commerce Business Daily to keep up with what is happening, who is buying and what services are being used in the marketplace, by what competitors, but by the time it reaches that point, in most cases as I have indicated, 50 to 80 percent of the time it is too late to jump in to participate, unfortunately.

Senator PRYOR. You state in your statement that you were educated, let's say, by the Chief of Procurement at a major Army command, about the silent power of the bureaucracy.

Has this message to you caused you to act differently?

Has it caused you to be silent or to raise your voice even more?

Mr. COCKERHAN. Obviously, by my being here, I have continued to raise my voice. I have learned how to survive. I will continue to stay in business because I understand the system in which I operate now and I weigh the risk, I believe carefully. But yet still there is a degree of that nonprofessionalism that can manifest itself in a bureaucracy that is sometimes not possible in the commercial sector; that is, the petty, vindictiveness that sometimes exists are more prominent in a bureaucracy where accountability is not a major issue.

Senator PRYOR. I think you stated, I don't know if it is in your prepared text, you were 4 years a civilian with the U.S. Army?

Mr. COCKERHAM. Six years.

Senator PRYOR. Were you involved in the procurement practices at that time?

Mr. COCKERHAM. No, sir.

Senator PRYOR. You had basically nothing to do with the procurement end of it?

Mr. COCKERHAM. No, sir. I provided similar services professionally in engineering and operations research.

Senator PRYOR. I was going to ask the question, how much is subjective in awarding contracts. Let me ask you to testify as an expert, as a small businessman, as to what you think might be subjective in awarding a contract or what percentage of subjectivity there might be in awarding contracts?

Mr. COCKERHAM. In fact, I don't think it is possible to answer that precisely because the business sector in the competitive market needs a balance of subjectivity and objectivity to make it operate.

As we have heard, different people bring up problems where one procurement doesn't fit. We really don't seek total fairness which was the premise that I heard earlier.

We only seek a system where we can operate efficiently; we have an opportunity to compete and we have a way to feed back our problems to improve the system of which you have mentioned you have done something along those lines.

That would be a great help because I, too, have gone through the GAO process and which is very costly and I went through it to learn about it and I indeed have.

I won't get into it. But all of us having gone through that process once to serve our country, find it is too expensive after that.

Senator PRYOR. I would like to say that both of the witnesses, Senator Cohen, have performed a real service by coming forward this morning. It is something I hope that we can impart to our colleagues.

Senator COHEN. Thank you very much for coming.

Our next witness will be Mr. William A. Long, Deputy Under Secretary, Acquisition Management, Department of Defense.

TESTIMONY OF WILLIAM A. LONG, DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING, ACQUISITION MANAGEMENT, ACCOMPANIED BY DENNIS TROSCH, OFFICE OF LEGAL COUNSEL, HARVEY GORDON, ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE FOR ACQUISITION, AND RICHARD STIMSON, DIRECTOR, OFFICE OF STANDARDIZATION AND ACQUISITION SUPPORT IN THE OFFICE OF THE SECRETARY OF DEFENSE

Mr. LONG. Thank you, Mr. Chairman.

I am William Long, the Deputy Under Secretary of Defense for Acquisition Management. Because of the several topics to be considered at this hearing I have several of my colleagues with me whom I would like to introduce. On my right is Mr. Dennis Trosch, Office of Legal Counsel. On my far right is Mr. Harvey Gordon, Assistant Deputy Under Secretary of Defense for Acquisition. On my left is Dr. Richard Stimson, Director of the Office of Standardization and Acquisition Support in the Office of the Secretary of Defense.

It is a pleasure to have the opportunity to appear before this committee to discuss your bill, S. 2127, and related subjects.

As I understand your procedures, my prepared statement will be included in the record. I would like to summarize it and talk about a few specific points, including some that were raised in the earlier testimony and statements, if I may.

I don't believe that there is any department in Government that recognizes the benefits of effective competition any more than the Department of Defense. I think that we do the very credible job in obtaining the benefits of competition. I am the first to acknowledge that we do not do a perfect job. There is room for improvement in the entire process which includes our own internal systems and our governing statutes. We think that the approach that S. 2127 takes in terms of improvements in the governing statutes has substantial merit.

It does recognize, as has been commented upon earlier today, that there are various kinds of competition in addition to the formal advertising procedure. Some people equate formal advertising with competition and don't acknowledge that any other kind of competition is effective. We think that is incorrect. Your proposed statute acknowleges this position.

We believe that the system under which we have been functioning for about 35 years, since 1947, is, while capable of being improved, not an unworkable system. In fact, we have some reservations which have led us to suggest to you and your colleagues that

perhaps a period of test procedures would be appropriate, because the Department of Defense has approximately 40,000 people directly involved in the procurement who have worked with the existing system for a period of up to 35 years.

As was also acknowledged there has been any number of interpretations, decisions by the GAO, by the court and the like that have added a gloss, if you will, of Precedential interpretation, and to possibly sweep much of that aside could be a mistake.

I understand Mr. Cibinic's testimony that much of the provisions where price is the sole determinant is akin to the present statutes; for example the words on sealed bid solicitations. We are troubled by the notion that it is close but not precise, and we all have been around long enough to know that different words are oftentimes argued to mean different things. There are differences between the procedures in S. 2127 and those in the existing statute, even though the thrust is the same. Where words change people argue that different words have different meanings. So we feel that a bit of caution is appropriate simply because of the magnitude of the operation that we are seeking to change.

Let me give you an example of a program that we are undertaking in the Department. On a test basis under our own overall attempts in the Department to improve our acquisition process, we have an interservice task group under the leadership of the Air Force that is seeking to improve the quality and reduce the size of the documentation used in procurements under $500,000. We have, and I think quite legitimately, been criticized from time to time because our contract documents are too complex or too redundant, et cetera. We hope within the next month or two to formalize a program under which certain commodities and classes of products can be procured under simplified procurement documents. In that regard, we are asking the contractor community for comments on these documents. We are also asking the acquisition community within the Department for comments. We will then assimilate the data, determine whether our new process is effective, make the appropriate adjustments and only then go back out into the field with it for wider applications.

We are not really smart enough—I don't think anybody is—to anticipate all the problems that may arise in a major procedural change. That is really the reason that we are suggesting to this committee that perhaps a bit of caution before embarking on a program such as is proposed by S. 2127 might be appropriate.

Senator COHEN. How would this bill impact upon the simplified forms?

Mr. LONG. I didn't mean to imply that this bill would impact our contract simplification program. I am simply trying to draw an analogy. Our program is carving out a small piece of the acquisition process, where we are trying to make a difference, to do things better but because it is impacting a number of people with years of experience under a different system, we are trying our new contract documents under a test program. I am not suggesting that this bill impacts it, but it is another element of improving the process that we think could be better accomplished in the long run if we move slower in the short term, in the interest of doing it right. That is all I am suggesting. We did the same thing with the

weighted guidelines—profit determinations—and the same thing with flexible progress payments.

These are complex systems that we are dealing with, involving a lot of people, and we believe in the long run it would be better if you go a little more slowly. Please don't interpret that in any way of saying that the Department of Defense is at odds with the sponsor of this bill or the committee. We are in absolute agreement with the ultimate objective.

One of the chairman's questions, to one of the earlier witnesses supports, I believe, our position that we ought to take a look at this and move more slowly. The Senator asked one of the earlier witnesses if the exceptions to competitive negotiations were sufficient. I don't think that we or this committee and the staff are really going to be able to determine that until the system is put into place. We have some suggestions for you to consider in terms of additional exceptions. They may or may not be acceptable, but I don't think the question that you asked is really susceptible of being answered until there is some experience.

Senator COHEN. Let me tell you what the problem is. The problem is that while you may say the system is working correctly, we have had 35 years of our existing procurement system and we still have only 36.6 percent of the contracts awarded competitively. If the law currently emphasizes competition, and after 35 years of experience only one-third of fiscal 1981 contracts were awarded competitively and two-thirds were awarded noncompetitively, it seems to me we have a different time schedule in terms of trying to change the system.

Mr. LONG. I understand the Senator's comments. Your numbers may be a little bit different than my numbers, which left out 40.7 percent competition in fiscal year 1981.

Senator COHEN. My numbers come from GAO.

Mr. LONG. I understand. But what do they really mean? They are in the ball park.

Senator COHEN. Let me give you another set of figures. We had hearings last year on cost growth in DOD weapons systems and found that in the 47 major weapons systems listed in the December 1981 SAR, cost growth exceeded $47 billion for the last quarter of fiscal 1981. That symbolized a very real problem we have in the way DOD goes about procuring weapons systems. Deputy Secretary Carlucci came before this committee and testified that both contractors and DOD buy in, thereby underestimating the cost of the weapons system. We are then presented with a bill that shows a cost growth of $47 billion for 47 weapons systems. All the money that we voted last year to cut out of the budget was wiped out with our 47 systems.

Mr. LONG. We share your concern. I would add, however, Senator Cohen, of all the problems that we are dealing with throughout the Government, competition is a solution to only part of them. We did have competition of one kind or another for 42 of the 48 major systems in the solicited acquisition report, either in design competition or some other type of competition, and yet we still had the overruns of the type that you mentioned. I only say, let it be known that competition is an effective device, but I don't think any one solution is going to cure all of our problems.

Senator COHEN. I don't want to suggest that this bill is going to achieve that. What I tried to indicate earlier is that we bear a measure of responsibility because of the way in which we appropriate or don't appropriate dollars that put our agencies in a bind at the end of the year. I don't want it to seem that we are up here lecturing the DOD. But we do have a very serious problem where our budgets are escalating and we're getting less.

We are paying more and more and achieving less and less. That pyramid is getting awfully thin at the top. What we are trying to determine is whether we can get more for our money, and whether we can do things in a better way. What we tried to do in the legislation is tighten and refocus the 17 exceptions. I encourage you to testify on the exceptions to competition provided in S. 2127. It seems to me within our 6 exceptions we have covered all the potential problems that DOD might confront which would necessitate awarding a sole source contract. All the possible reasons for going sole source have been taken into account. What we are trying to do is narrow the exceptions. If you add more exceptions, we will be back to the same old system.

Mr. LONG. We don't want the old system. If we go to the S. 2127, nobody is asking for the old exceptions which were not exceptions to competition but exceptions to sealed bid advertising. The present process as you know, calls for the determinations and findings to except a procurement from sealed bid procedures. That is not a sole source justification. In each buying command, virtually every sole source contract with the exception of small purchase orders and some of the utility contracts, a sole source determination initially made by the contracting officer must be reviewed at a higher level.

So there is a process that has at least some oversight, however ineffective one might consider it? But let me move on with my remarks and then we can get to the questions.

On the matter of specifications, I don't think that our policy is any different from the objective sought to be accomplished by the legislation. We understand that it was amended last Friday and we will have an opportunity to give a better analysis of those amendments later. But I think our policy is consistent. We do recognize the problems that have been addressed here today as the bill and its amendments acknowledge. There are some different tensions that drive specifications to a greater or less detailed level. Uniforms for example have to be bought to uniform specifications and need to have detailed specifications if they, in fact, are going to be uniform. In some instances the competitive process itself requires a rather precise denomination of what we are buying to give all prospective bidders an opportunity to be certain they are bidding on the same item.

We are going more to commercial item descriptions, as Senator Rudman indicated. Some businessmen are troubled by that. They think that may be anticompetitive rather than competitive. None of these issues that we are dealing with are easily analyzed or solved. The fundamental point that I would like to make is that we recognize that there are different circumstances that call for different levels of detail or generality in the statement of our requirements. While we are not by any means perfect in our application of

the policy and the decisions, we do work very hard to do a good job in determining the correct level of specifications.

The final point your letter of invitation indicated you wished discussed was the matter of reporting data on procurements in a competitive and noncompetitive sense. I think it is important in the context of any set of data to understand the definitions. Different people view different words as having different meanings. I think that one thing that we have really done over the years is have a consistency in our definitions. We don't think that the allegations of recent vintage that our changes in data reporting are misleading are really fair comments. We have explained very clearly what we mean by various categories. We have analytically adjusted comparable data in the prior year so that people can understand on a comparative basis what we are doing. But I think the important thing is really that the definitions be clearly understood by the reader. Therefore I have provided in my statement a set of definitions that we have used for quite some time.

Just a couple of comments if I may on the prior testimony. There was a comment, I believe, by Senator Pryor or a question about disciplining contracting officers for failure to compete. Senator Pryor, I would like to be sure that you understand that at least in the Department of Defense the contracting officer does not make the sole source determination. He prepares the justification and with the couple of exceptions that I just mentioned, the small purchases, the public utilities contracts and the like, there is oversight at least one level higher than the contracting officer.

So the decision is not simply a unilateral decision made by one individual without any supervision. That doesn't mean again that we are always right. But I did want to make it clear that we do have internally in our system some oversight.

In terms of stimulating competition early on, one of the earlier witnesses seemed to be saying that, in many of our procurements, publicizing in the Commerce Business Daily really wasn't enough to stimulate competition. I would just like the record to show that we do a lot of work to let industry know of our requirements well in advance of a Commerce Business Daily announcement for many of our procurements. Maybe some of what I am going to say applies to the more sophisticated systems in contrast to the types of procurements that the earlier witnesses testified to.

But we do things like issuing draft RFP's to the industry for their comment, not only on the specifications, be they more or less detailed, but also on the terms and conditions of the financing package, the delivery schedule, et cetera. As we do that, we really engage in a dialog with the contractor community on the process. That does bring people into the system. It doesn't mean that they will necessarily submit a proposal but it does let them know of our requirements early on.

I would also like to comment briefly on the matter of subcontractor competition. We recognize that prime contracts for some major systems are really not susceptible of competition because, as has been suggested, there is only one Trident nuclear submarine manufacturer or there is only one aircraft carrier shipbuilder. However, but even in those circumstances, we recognize that at the subcontractor level we can do things in our relationship with the prime

which will motivate and stimulate the prime to engage in more effective competition at that level. As you know, we do not buy directly from the subcontractor. At some point we could break the component out and buy it directly or compete it, which is a different type of program in recognition of competitive possibilities.

The last thing that I would like to mention is really two things. I think we have to recognize that in some instances front end competition or follow-on competition requires a front-end investment. Second sourcing is an example. It can cost many millions of dollars simply to go through the dual source competitive process to see if somebody is interested in becoming the second source and if so, at what price.

Then at least, as a Nation, without regard to who puts up the capital, in any major system there is a tremendous investment in duplication in the output sense of the investment already made by the existing contractor. That isn't to say that second sourcing ought, therefore, not to be used. I don't mean that at all. I just simply think we need to recognize, as we think about competition, that there is a front-end investment. The long-term benefits may very well exceed the short-term front-end cost. But I just caution that you recognize that.

The last point I would like to make is in connection with your question of Mr. Cibinic on our comment about the burdening of the process. That was a comment, Mr. Chairman, directed to some of the details that we would like to work on with the staff. There is nothing major in them. I just didn't want that to be out of context. For example, part of the bill is susceptible to what, we are sure was an unintended interpretation, but if the unintended interpretation were the prevailing interpretation we would lose the ability to get certificates of current cost or pricing data. We don't think that is the intended result. That happens in every legislation. My comment is intended to let you know we would be happy to work with you in working out these things that seem to be a problem.

Senator COHEN. On page 3 of your written statement you indicate that some provisions of S. 2127 appear unecessary or will unduly burden the efficient operation of the procurement process. Which provisions are those?

Mr. LONG. We have a sort of technical analysis that I really was going to work on with your staff and not burden the members, because there is nothing major as I say. I wanted to clear the record on that. Make provision against bias or favoritism. We, in fact do have bias and favoritism in a sense, in the small business set-asides and in some other procedures. It is using the word bias and favoritism in a very different sense than is intended, to be sure, but we cannot predict how some court of last resort, be it the GAO or some other decisionmaking body is going to interpret those words.

We would simply like to discuss with the staff whether there is a better set of words.

Senator COHEN. What if we said bias or favoritism except as statutorily authorized?

Mr. LONG. I don't think we want to belabor that issue although I would be happy to answer any question that you have. But that is not a comment of ours intended to imply that we are negative to

the bill, just that we see some drafting problems and we would like to work with you on it.

Senator COHEN. How many of those questions do you have on the drafting?

Mr. LONG. I think there may be a half dozen or so of greater or lesser significance, some perhaps easily cleared up.

Senator COHEN. Mr. Long, the procurement notice in S. 2127 insures, at least it is designed to insure that potential competitors have sufficient time to respond to prospective DOD contracts. Do you consider that to be too burdensome?

Mr. LONG. As the committee or staff may know, I testified earlier this year before a subcommittee of the House Armed Services Committee on H.R. 5350—a bill practically indentical to Senator Levin's amendment. We have a supply pipeline that will be effected as we expand the procurement time. We lengthen the time required for an item to be purchased and moved from producer through distributor to user.

Senator COHEN. We are talking prospectively. This hasn't become law yet. We are talking about prospective application of a new procurement policy.

Mr. LONG. Maybe I misunderstood the question.

Senator COHEN. How is this procurement notice requirement going to impact now upon something that is already in existence? You mentioned the impact upon the pipeline of supplies.

Mr. LONG. I was answering a question you did not ask, Mr. Chairman. I am sorry. I misunderstood the question.

Senator COHEN. How would this impact upon the pipeline of supplies?

Mr. LONG. I am talking about the notice in the Commerce Business Daily. We have a supply of goods and services in our whole logistics system. That system has to accommodate the time between the determination of a need for a widget and the time we receive it.

Senator COHEN. I understand.

Mr. LONG. As you expand that time, the amount in the inventory has to be expanded. So there is a cost to it. Instead of having a 30-day supply of something, you may need a 50-day supply. We have had some experience, as you know, in publishing notices in the Commerce Business Daily, albeit for shorter periods of time, but nontheless we publicized them. We have some question about whether that will be an effective stimulus to competition. I will be pleased to provide the committee with the statement I mentioned earlier.[1]

Senator COHEN. If you would. It will be included in the record.

Senator Levin, I know, has had a very substantial interest in the question of whether or not small business companies have an adequate opportunity or adequate notice to respond to prospective Government contracts or is it a foregone conclusion by the time they see something publicized in the Commerce Business Daily, that it is too late for all practical purposes to really get a bid in, much less formulate a bid?

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[1] See p. 54.

Mr. LONG. Let me address that. The Commerce Business Daily is not and should not be relied upon by a businessman of any size as sole reference.

Senator PRYOR. Could Mr. Long move the microphone a little closer? Thank you.

Mr. LONG. One of the most effective ways in our experience to obtain information early on is to get on the bidders list. We have booklets that we send out regularly to small and large businesses on how to do business with the DOD. That includes information on the bidders list. As one of the gentlemen who immediately preceded me testified, he doesn't rely solely on the Commerce Business Daily. He is in the market with his ear to the ground. That at least in my judgment is all a proper part of the marketing activities that a businessman has available to him and ought to avail himself of.

I don't think the Commerce Business Daily, whether there is a 10-day or a 30-day or a 100-day notice, is going to do it for everybody. But there are lots of other things, points of information available, that can be much more important than the Commerce Business Daily.

Senator COHEN. Mr. Long, would you tell us how your assessment and your figures differ from those of GAO? What do you include as competitive contracts that GAO discounts?

Mr. LONG. If you are looking at this chart [1] and understand the definitions, we are talking about the same thing. We had a total, and I am talking 1981, the last year of the chart, competitive procurement including formally advertised, other price competition, design, technical competition of 40.7 percent of our procurement dollars. We also had what we break down as noncompetitive. We identify several subsets which this data does not identify. For example, there are follow-on after price and design and technical competition. Many of our major weapons systems annual buys are follow-ons to design competition awarded on a competitive basis. We think these merit identification as separate categories because, at the very least, there would be some sort of competition in the process.

Senator COHEN. I am sure you have read Gansler's book called The Defense Industry in which he points out that one of the major problems we have is that R. & D. contracts may go to one firm and susequent contracts are then awarded to the same firm with no competition whatsoever.

Mr. LONG. I have discussed this many times with Dr. Gansler. He was in the same position I am a few years ago. We wrestle with the same problems. I am suggesting, please don't misunderstand me, nothing other than we think such contracts are worthy of separate identification. So in our data we have a subset for this noncompetitive category. We have a couple of other subsets; catalog or market price is by definition not competitive. But if commercial market forces work, the price is set competitively in the marketplace. So even though we may go to X to buy something, out of the catalog or the GSA catalog, the price is reasonable because it is an item with a market. So we are getting the benefits of competition even

[1] See p. 54.

though it is a sole source contract. That is not a big player in the game. It is 3.4 percent of the red column there in 1981.

The other noncompetitive category covers the rest. So our numbers are the same. We would just present them perhaps a little bit differently.

There are other ways to look at this, though, and I don't say this defensively. It just depends upon what really you are trying to look at. Contract actions for the year 1981 were something like 12.7 million actions, including not only contract awards, but any other contract action that occurred during the year that obligated money. We had in 1981 new contracts over $10,000 in the number of 122,900. Total contract actions in excess of $10,000, totaled 326,000. A third of those were new contracts.

Looking at the two categories, price competition and design technical competition, in dollars of those new contracts, 49.5 percent of the dollars were competitive.

So one can look at the subsets of this data and see from at least one perspective, that is, new contracts awarded in 1981 in excess of $10,000 we did a better job than one can infer from the overall data. I am not trying to prove anything except that there are pieces of this data that display different things.

Senator COHEN. We are all laymen up here and you are a procurement specialist. I don't expect you to respond to the specific problem that was addressed before with Mr. Polites. But how would you respond to him when he held up his product, which he claims is better and cheaper than his competitors, and yet he can't even compete because of a restrictive DOD specification. What would you say to him?

Mr. LONG. I guess the first thing I would do before I said anything would be to hear the other side of the story. With all due respect to everybody involved, there are always two sides. I am not aware of the problem. I haven't seen the correspondence. In the view of some responsible person or persons, there apparently was a compelling need for the specifications to be that way, whether because of the way they interface with another piece of gear or equipment, I simply don't know. I think the first thing would be to look at the other side and then make a reasonable judgment on what is the proper and fair thing to do.

Senator COHEN. I am sorry?

Mr. LONG. What the proper and fair thing to do is. That may or may not be a proper specification. If it is not, it may be appropriate to change the specification to a more generic type, be it functional or just less precise.

Senator COHEN. How would someone like Mr. Polites go about doing that? I guess what Senator Pryor is trying to get at is what does the individual who is trying to compete for government contracts do when he is confronted with restrictive specifications? What does he or she do to try to say maybe that specification is wrong, biased, or preferential? Maybe it is sole sourced for a different reason. How does a person fight against that system? Where is there somebody that they can go to to say hey, why can't I compete?

Mr. LONG. It is a system that tries to be responsive at various levels. The contracting officer is part of the process. We see items

of correspondence regularly from people in senior positions, both technical and procurement. Ultimately it comes to the Secretary of Defense.

Senator COHEN. The Secretary of Defense is not going to look at 54,000 contracts.

Mr. LONG. I understand that. But I am having a difficult time responding to your question because the witness did communicate with the Secretary of the Navy and was not satisfied with the response for perhaps very valid reasons. So the system isn't providing him the sort of responsiveness that in my judgment the system should provide. But there are other avenues. You can get to the various offices of the Secretary of Defense and the military departments. One can correspond with you and your colleagues. A protest could be filed with GAO. I don't recall whether the gentleman went that route or not. I know that those processes can be expensive. I am not saying that there is any one answer. There are a lot of avenues. If the system works properly, at some point without spending a lot of time and effort there ought to be a satisfactory answer. At the same time I will say I know that there are times when somebody will not be satisfied because the system, as good as I think it is, is not perfect.

We are human beings with human frailties.

Senator COHEN. Mr. Long, thank you.

Senator Pryor?

Senator PRYOR. Mr. Chairman, I will take only a short time. I know Senator Levin has several serious questions he wanted to ask. I will be just as quick as I can.

Mr. Long, we are talking about the expenditure of taxpayer's dollars. One expenditure we have not talked about today, I am almost embarrassed to bring it up because I have talked about it so much, but I am going to ask you a question about it.

Your Department, the Department of Defense, spends approximately—I know that there is a definitional problem with OMB, and the agencies and GAO—about $2 billion a year for consultants. Seventy percent of that expenditure is noncompetitive. How do you, one, justify that, and two, how do you recommend that we tighten that expenditure up?

Mr. LONG. I am not certain, Senator, that I can answer the latter, if by "we" you mean the legislative branch.

Senator PRYOR. Why don't you advise us as Senators as to how we might make the procurement of consulting services more efficient. Something is evidently wrong, 70 percent of it being sole source.

Mr. LONG. Some by necessity, I think, will always be sole source because it is service that we are buying that is really in the mind of the individual. I can't tell you whether that is 1 percent, or 20 percent, or 70 percent. But Dr. Gansler, who Senator Cohen referred to, discussed with me a number of times his concern that we are drying this industry up and we are losing these people in our attempts to inject more competition. I am not suggesting that he is right or wrong. I am simply reporting my conversations with him because his concern is that the individual's idea, be it a land warfare idea, or a new design concept for a satellite, whatever it is, is in the mind of the individual. If we take his proposal, his state-

ment of what he would like to do, and put it out in a RFP for the rest of the world to see, he is not going to come back to us again.

So some of that will of necessity be sole source. We don't, I will frankly admit to you, right now have a good handle on all of the consulting management services contracts. We are in the process of beginning to put together the data to understand just what we are doing and develop suggestions for you and for us on how to get a handle on it. That is a nonanswer but I think it is an intellectually honest one in terms of the gross data at this time.

Senator PRYOR. Mr. Long, I have been sitting here reading the 17 exceptions to formal advertising. One of our witnesses stated that these exceptions created an environment, not quite his words, big enough to drive a Mack truck through. In reading these exceptions I can see why Senator Cohen and Senator Levin, and others who have offered S. 2127, spent so much time trying to look at these exceptions in this legislation. Reading the exceptions, I think they are large enough to drive three Mack trucks through. Especially, Mr. Long, I would refer to exception No. 10, and exception No. 16. Exception No. 10 of course is the purchase or contract of property or services of which it is impracticable to obtain competition and No. 16 is that exception which says in the interest of national defense, et cetera, that you don't have to have any competition.

I would like, and I doubt that you have this information available for the committee at this time, to request that on exceptions No. 10 and 16, that you detail for the committee those contracts and awards that you have granted, utilizing exceptions 10 and 16 in the past 2 years.

I don't think that is unreasonable. I would like to see how many times those two specific exceptions are being utilized. I think we will see that those two exceptions are being grossly abused. It is my own opinion. I am a layman. I think we are going to see a great abuse of those exceptions within the Department of Defense.

Mr. LONG. These are exceptions to sealed bid advertising, not to competition. These two exceptions are used frequently to support negotiated procurement. Again, these are not independent exceptions from competition.

There is still a second level of determination that needs to be made. Once the justification for using a procurement process other than sealed bid—which is what these relate to—is made, then there must be documentation to justify a sole source award.

Justifications for sole-source awards do not fall within a statutory provision. It may be that many of the D. & F.'s on exclusion from advertising are actions inherently noncompetitive. But I will get you the data.

I would hope that you mean in terms of dollars and numbers of contracts. and not a list of contracts.

Senator Pryor. I think that would suffice. I think it would give us at least some guidepost to look at as to generally the trend over the last 2 years.

[The information follows:]

USE OF NEGOTIATION AUTHORITY

[Dollars in billions]

	Fiscal year—	
	1980	1981
Title 10, United States Code, section 2304(a)(10):		
Number of actions	504,000	553,000
Total awards	$22.7	$32.5
Competitive awards	$4.2	$9.9
Percent awarded competitive (percent)	18.4	30.5
Title 10, United States Code, section 2304(a)(16):		
Number of actions	3,700	5,400
Total awards	$2.8	$4.1
Competitive awards	$1.8	$1.9
Percent awarded competitive (percent)	63.1	46.2

Senator PRYOR. My final question and I will yield to Senator Levin. Do you have an advocate for competition within your office?

Mr. LONG. We have an advocate for competition in all of the military departments and they are, in turn, in the process, if they have not already accomplished it, of appointing an advocate for competition in each of the commands.

Senator PRYOR. Are they identifiable?

Mr. LONG. I cannot identify them to you today.

Senator PRYOR. But are these identifiable people that can be identified to the public or the small contractor that is attempting to do business with the U.S. Government or the Department of Defense?

Mr. LONG. They are. They are identifiable by office and by name of individual which of course may change over time. But the office will presumably remain the same.

Senator COHEN. The Chair will have to interrupt.

Senator PRYOR. I am finished, Mr. Chairman.

Senator COHEN. Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

Mr. Long, your testimony this morning states that the Office of Federal Procurement Policy recommended a test of similar procurement procedures in its proposal for a uniform Federal procurement system that was submitted to the Congress on April 30.

I think what you are saying is you are looking for a pilot program in this bill and that the OFPP recommends a similar pilot program in its report?

Mr. LONG. Yes; while there are some differences in the wording of the two statutes, the objective I have and the thrust are largely the same.

Senator LEVIN. I am talking about whether or not there should be a test period. You are suggesting OFPP recommends a test period before we go full blast with our reform.

In the original draft which was proposed by OFPP, did they recommend a test period?

Mr. LONG. My recollection is that in an earlier draft there was a similar set of provisions, perhaps not precisely the same, but similar and they did not propose a test.

Senator LEVIN. Did the DOD press the OFPP to insert a test period in their final proposal?

Mr. LONG. In our comments to OFPP at various stages we suggested for much the same reasons that we are suggesting here that we ought to move cautiously. I believe that the OFPP records would indicate that a number of other agencies have commented similarly.

Senator LEVIN. Is it not true that three former heads of OFPP testified before a Senate subcommittee that they were disappointed that the OFPP changed its position on that?

Are you familiar with that testimony?

Mr. LONG. I am familiar with the event. I am not familiar with the precise testimony to which the Senator has alluded.

Senator LEVIN. I have a problem in terms of DOD's attitude toward competition. It seems as though we constantly run into opposition from the DOD for reforms in this area in order to stimulate competition.

The OFPP policy before DOD and other agencies' comments did not have this limitation we are talking about, and you and I have gone round and round in terms of the amendment to the DOD authorization bill. On the DOD authorization bill we had a very modest increase in the number of days which would be required for publication for sole source contracts to give other folks a chance to give notice that they were able and willing to compete. That increase to just a 30-day period brought opposition from DOD and we tried to satisfy DOD's concerns.

We modified it. We watered it down so much that GAO said that it no longer was very effective. We got DOD support finally, put it on the authorization bill in the Senate and then went into conference and found that the House was opposed to it because the DOD was telling the House they still objected to this increase in the number of days that the potential competitors would have to offer competitive proposals.

So my own feeling is, frankly, that we have opposition in the DOD to increased competition. and I don't think you would agree with that, but I will give you my impression and let me ask you a specific question.

What percentage of the DOD procurement dollars spent would you like to see spent competitively?

Right now, according to GAO statistics, 59 percent are noncompetitive. You can break it down into our own subcategory if you want. I think there is some merit in what you say in terms of follow-on contracts. I don't want to argue the semantics of it. But what percentage is your goal?

Mr. LONG. I don't think one can have a goal forever. If you look at the 1982 budget, it had some very large unique systems that are going to skew the numbers for 1982. I think we all know that. We have two aircraft carriers and a number of other very high doliar value systems, particularly the items that are simply not susceptible to competition, I think that the opening remarks of one of the Senators, I don't recall which, is really the key; that is, the trend. I would like to see the trend up. I would like to see the data understood so that we really know whether in the areas where we can compete, we are doing a better or less effective job.

Senator LEVIN. In an average year, what percentage would you like to see as a goal?

Mr. LONG. If we are talking early 1980's, I would like to go to 45, 47, 48 percent. It isn't going to change dramatically. I hasten to add that in talking about numbers that are meaningful, and I think that if the job that we are or any other agency is doing is going to be properly analyzed, we have to look at the events of that year.

I hope that in 1982 we will do a better job than 1981 except for some of these major procurements that are simply not susceptible to competition.

Senator LEVIN. One last question. I know the time crunch, Mr. Chairman.

You have indicated that the potential competitors do not or should not rely solely on the Commerce Business Daily. I happen to agree with that. The question, though, is whether many do or could rely on the Commerce Business Daily?

Is it a source of information and, if not, why not allow 30 days to give people a fair chance at filling out an alternative proposal? Ten days is just nonsense. Every small businessperson who sits there, over at tbe Small Business Committee or in the Armed Services Committee tells us the same thing. Forget the 10-day proposal. It doesn't do it. It doesn't give us a shot at it.

If you want to have a Commerce Business Daily, make it useful. Since it is a potential source, my question is and I agree with you, we ought to get the folks on the bidder's list, why not make it a realistic period of time?

Mr. LONG. The way you asked your question, if it is a source of information, why not make it realistic? I cannot disagree. If it is a source. It ought to be unless the price you pay is too high for the expected results. I don't think you and I differ in respect to the results. We may differ in the price we pay. But it does have a cost associated with it. Don't please however go from that to the notion that we are therefore against competition. I think it is fair to say that you and I in our respective offices may disagree on how best to achieve that. I don't think we disagree on the ultimate objective.

Senator LEVIN. I hope not. The evidence that you agree with increased competition is not overwhelming. Every time we turn around on this kind of proposal, you are trying to stop it, to the limit OFPP, for one, to get this thing going. You wanted a test program. You persuaded them. There has been so much testimony in need of this kind of thing that we ought to get on with it.

Whether it is that, whether we increase 10 days which admittedly is insufficient to 30 days, whatever it is, I have a feeling there is not an awful lot of support in DOD in this direction.

I think there is a statement of the goal. Everyone says we are for competition. Carlucci's memo finally added, as the 31st initiative, competition as a goal.

Mr. LONG. No; initiative 32 is increasing competition.

Senator LEVIN. I stand corrected. It wasn't listed in the first 31. A couple of months later, as an afterthought, competition was listed as the 32d goal by the Secretary of Defense without any numerical goal to be achieved.

But all I can say is from my short experience in the area of procurement I do not see DOD as being the engine for change. I find it being the resistor.

Mr. LONG. I guess your focus is legislation. My focus is our internal processing and I would ask you to look at things like our ASPJ procurement, where we use some very creative front end contracting techniques in order to provide for meaningful second source contracting on a very large program.

We will have competition there. So I think, as I say, our differences may be on how best to do it, but not the ultimate objective.

Senator LEVIN. I hope not.

Thank you.

Senator PRYOR. We thank you, Mr. Long and your associates. That is all the questions we have for you at this time.

[Mr. Long's prepared statement and a statement presented before the Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services, U.S. House of Representatives, May 4, 1982, follow:]

STATEMENT ON S. 2127 BY WILLIAM A. LONG, DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING (ACQUISITION MANAGEMENT)

Mr. Chairman and members of the committee, I appreciate the opportunity to discuss S. 2127, a bill to revise the procedures for soliciting and evaluating bids for government contracts and awarding such contracts, as well as other procurement matters.

We believe that there may be room for improvement in our 35-year-oid procurement statute, and that this bill may be a step in the right direction. Accordingly, we could support S. 2127 with few modifications and a preliminary test program.

Title II of this bill would amend the Armed Services Procurement Act of 1947 as now codified in chapter 137 of title 10 of the United States Code by changing the philosophy and concept of the Act from formal advertising versus negotiation to competitive versus noncompetitive. We welcome this new philosophy and believe that it best represents the real procurement world. For many years, we have been troubled that many knowledgable people have equated competition to formal advertising alone, overlooking the use and benefits of competitive negotiation. Eliminating the term "formal advertising" and uniting all types of competition under the broad term "competition" would be most helpful in this regard. Further, it would be beneficial and helpful in our efforts to more effectively obtain the benefits of competition in Defense procurement.

Title II, however, provides a considerable change in time-honored procurement procedures. Formal advertising has been with us for many years, and its procedures are well understood and accepted by industry and Defense personnel. A myriad of court and General Accounting Office decisions have developed well-defined interpretations and nuances that restrict and guide formal advertising. Title II would nullify much of this background. Procurement personnel would have to change not only their outlook and philosophy but their procedures as well. We consider that a change of this magnitude should not be adopted and implemented without careful consideration of all facets.

Therefore, while we are favorably disposed towards this new concept, we believe that it is essential to test the concept and operating procedures before legislating it on a government-wide basis. An immediate, untested changeover could disrupt the orderly processing of procurements and might adversely affect our Defense posture. We would be most happy to work with you in performing a test at several of our purchasing activities. Setting up a test program with its procedure and training problems will be difficult in itself; then, the test must be allowed to run a reasonable length of time for optimum results. The test would be used to validate the necessary new procedures before giving further consideration to permanent legislation. In this connection, it should be noted that the Office of Federal Procurement Policy recommended a test of somewhat similar procurement procedures in its proposal for a Uniform Federal Procurement System that was submitted to the Congress on April 30, 1982.

We would also be happy to work with members of your staff to refine the bill's language. As could be expected in the case of any major piece of legislation, some changes are desirable to clarify the intent. In addition, some provisions appear unnecessary or will unduly burden the efficient operation of the procurement process.

In summary, we support the thrust of the bill, but believe it should undergo a test period before embarking on full-scale implementation. We stand ready to work with your staff in developing such a test program and in refining and clarifying the language of the bill. In my opinion, if we were sitting down today to draft what eventually became the Armed Services Procurement Act of 1947, the philosophy expressed in the provisions of this bill might well have been the cornerstone advocated for that Act.

You expressed interest in the effect specifications may have in obtaining competition. Specifications are necessary, as they communicate our requirements to a contractor. They describe required technical characteristics and, thus, serve as a basis for effecting competitive procurement. Conversely, the absence of adequate specifications is a major reason for noncompetitive procurements.

It is Department of Defense (DOD) policy to use performance specifications rather than detail specifications where possible. Our purpose is to tell a contractor what performance is required of an item as opposed to how to build it. We believe this optimizes competitive opportunity and stimulates contractor creativity. There are trade-offs, however. Quality, logistics support, and standardization considerations sometimes mandate a degree of detail. We strive to achieve a proper balance of these objectives in developing specifications.

Maintaining technically current and realistic specifications requires continuous management attention. DOD components are always engaged in improving and simplifying specifications. In this effort we encourage industry inputs in order to ensure the development of cost-effective specifications and consideration of the best commercial practices.

We are also emphasizing the procurement of commercial and modified commercial supplies that meet military requirements as a means of expanding competition. In this effort we participate actively with nongovernment associations in the development of private sector standards. DOD adoption and use of standards prepared by these groups align our requirements more closely with commercial capabilities. To date, more than 2,900 nongovernment standards have been formally adopted, and thousands more are used as references in our military specifications.

Another method we are using to simplify specifications and enhance competition is through the development of Commercial Item Descriptions (CIDs). These documents are "short-form" specifications written in performance terms that reflect acceptable commercial products. CIDs eliminate many of the detailed military-unique requirements manufacturers have found objectionable in government specification. The essential elements are structured in such a way that a variety of competitive alternatives will meet the functional requirement.

While we are simplifying specifications to enhace competition, it does not follow that detailed military specifications preclude competition. In some cases, detailed specifications must be used to ensure that all prospective suppliers are bidding on the same item that meets our needs. Components and spare parts for major equipment are examples where form, fit, and function, as well as useful life, are essential. Uniforms must also be standardized and manufactured to detailed specifications in the interest of uniformity and wearability. As long as these specifications are available and understood, potential suppliers have little difficulty in responding to solicitations.

You also expressed concern that there be effective and accurate statistics from which to judge the effects of any legislation, including S. 2127, on the competitive process. You indicate that the DOD may be reporting higher levels of competition than may be warranted.

First, let me say that we believe our system for the collection and reporting of procurement statistics is adequate for reporting the extent of procurement competition and competitive trends. Our Procurement Management Reporting System has been in effect for almost 20 years.

Under our system, procurement transactions of the Military Departments and Defense Agencies are reported on a regular basis. For those transactions reflecting obligations in excess of $10,000 (will be revised to $25,000), a form providing 30 elements of data, including the extent of competition, is required to be prepared by the purchasing office. For those transactions reflecting obligations of less than $10,000 (will be revised to $25,000), a monthly summary form of selected data, including the extent of price competition, is required to be prepared by the purchasing office. All data is processed on automatic data processing equipment monthly, and machine

readable magnetic tapes containing the data are provided by the DOD Components to the Washington Headquarters Services, a field activity of the DOD, for consolidation and the preparation of statistical tabulations. In addition, our data are provided to the Office of Federal Procurement Policy for inclusion in the government-wide Federal Procurement Data System.

We break down our statistics between competitive, which consists of formally advertised, negotiated price competitive, and design or technical competition; and noncompetitive, which consists of follow-on after price competition, follow-on after design or technical competition, catalog or market price actions, and other noncompetitive actions. These categories are defined as follows:

FORMALLY ADVERTISED

A procurement transaction resulting from formal advertising is inherently price competitive.

NEGOTIATED PRICE COMPETITIVE

A procurement transaction is reported as price competitive if offers were received from at least two responsible offerors, and the award was made to the offeror submitting the lowest price.

DESIGN OR TECHNICAL COMPETITION

A procurement transaction is reported as design or technical competition when two or more qualified sources submit design or technical proposals, and the award is based primarily on this factor, rather than on price.

FOLLOW-ON AFTER PRICE COMPETITION

A procurement transaction is reported as follow-on after price competition, if selection of the contractor at the inception of the program resulted from price competition.

FOLLOW-ON AFTER DESIGN/TECHNICAL COMPETITION

A procurement transaction is reported as follow-on after design/technical competition, if the selection of the contractor at the inception of the program resulted from design/technical competition.

CATALOG OR MARKET PRICE ACTIONS

A procurement transaction is reported as a catalog or market price action, if it is a noncompetitive action, and the price is based on established catalog or market prices.

OTHER NONCOMPETITIVE ACTIONS

A procurement transaction is reported as other noncompetitive action, if it is awarded solesource and not included in any of the above categories.

There are several categories in which the extent of competition is not reported. In the following procurement transactions, there is no opportunity or reasonable expectation that awards can be made on a price competitive basis: awards for brand-name items for commissary resale, as determined by customer preference; awards to regulated monopolies for utility service; and awards made pursuant to Section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

Additionally, procurement transactions categorized as intragovernmental and foreign military sales are excluded from reporting the extent of competition. Intragovernmental transactions are procurements placed with other agencies—e.g., Federal Prison Industries, National Industries for the Blind, orders under General Services Administration Supply Schedules, etc. Foreign military sales are procurements under a sales arrangement whereby a foreign country or international organization undertakes to bear the cost of the procurement.

As a further note, our policy prohibits the reporting of any procurement transaction as price competitive, if the award is made under a cost-reimbursement type contract, even though competitive offers were solicited and received. These awards must be reported, but in some other category, such as other noncompetitive. Approximately 25 percent of our procurement dollars are awarded under cost-reimbursement type contracts.

It has come to our attention that there has been a misunderstanding that three of the above noncompetitive procurement categories were presented in congressional testimony as competitive: (i) follow-on contract awards initially established through price competition, (ii) follow-on awards initially established through design competition; and (iii) awards based on catalog or market prices. Such representation has never been our intent.

For many years we have required the reporting of follow-on awards. However, we recognize the follow-on awards are not competitive awards and, therefore, are not included in our statistics as such. We distinguish follow-on awards from other noncompetitive contracts because the sources were initially selected on a competitive basis.

As to awards based on catalog or market prices, our intent is to break out from other noncompetitive awards those awards that were based on catalog or market prices. Where catalog or market prices have been established in the marketplace, competition is presumed to have established the reasonableness of the prices. Generally, we obtain discounted prices at least as low as is charged by the supplier to his most favored customer. While these awards are not categorized in our statistics as price competitive, we believe it proper to portray them separately from other noncompetitive awards.

We endeavor, in discussing and presenting our procurement statistics at congressional hearings and elsewhere, to clearly indicate that these three procurement categories are noncompetitive. If the testimony gives a contrary impression, we clarify this during our editing of the hearing transcript.

I have attached a statistical summary of competition in procurement for fiscal year 1981 portrayed in accordance with our reporting system.

This concludes my statement, and I will be pleased to answer any questions you may have.

COMPETITION—FISCAL YEAR 1981

[Dollars in billions]

	Amount	Percent
Competitive:		
Formally advertised	$7.0	7.9
Other price competition	22.5	25.5
Design/technical competition	6.5	7.4
Subtotal	36.0	40.7
Noncompetitive:		
Follow-on after price or design/technical competition	20.8	23.6
Catalog or market price	3.0	3.4
Other noncompetitive	28.5	32.3
Subtotal	52.3	59.3
Total	88.3	100.0
Excluded transactions in which the extent of competition is not reported	17.0	.....
Grand total	105.3	.....

STATEMENT ON H.R. 5350 BY WILLIAM A. LONG, DEPUTY UNDER SECRETARY OF DEFENSE FOR RESEARCH AND ENGINEERING (ACQUISITION MANAGEMENT)

Mr. Chairman and members of the committee, I appreciate the opportunity to discuss the Department of Defense (DOD) position on H.R. 5350, a bill to amend chapter 137 of title 10, United States Code, to impose certain requirements on the awarding of sole-source contracts by the military departments.

H.R. 5350 provides that the head of a military department may not enter into negotiations for the award of a sole-source contract for more than $100,000, unless preceded by a 30-day public notice published in the Commerce Business Daily, and all interested persons have been permitted to submit proposals. It further requires the head of the military department to approve the proposed negotiation of any such contract. The Secretary of Defense may waive these requirements because of national security reasons. Certain specified types of procurements are exempted from

these provisions. This bill would also require the Secretary of Defense to make annual reports on all sole-source contracts exceeding $100,000 entered into by each military department during the preceding fiscal year.

The DOD is strongly opposed to this bill, primarily because its provisions would add to the administrative workload, place an onerous burden on the Department, and extend the already lengthy procurement lead times for those procurements that would be affected. In our view, adding to procurement lead time could adversely affect the carrying out of the defense mission.

Further, H.R. 5350 would prohibit the entering into of contract negotiations until 30 days after publication of an advance notice in the Commerce Business Daily. Thus, requests for proposals could not be given to anyone, including firms responding to the brief Commerce Business Daily notice, during that 30-day period. This prohibition would delay receipt of detailed requirements by potential suppliers, would delay their efforts to develop proposals, and would delay the procurement process. It would particularly affect small business firms and could lead to ill feeling, as they would have difficulty in understanding why we could not send a request for proposal to them immediately.

The listed exemptions do not include several types of procurements that should be exempted. The annual report required by H.R. 5350 is unnecessary, burdensome, and duplicative of existing statutory requirements for government-wide reporting of procurement data.

In addition to the above objections, we believe that H.R. 5350 is not necessary. The Small Business Act prescribes criteria and exceptions covering the publicizing of proposed procurements by all Federal agencies in the Commerce Business Daily. Implementing procedures for the DOD are published in the Defense Acquisition Regulation. We synopsize proposed procurements over $10,000, both competitive and noncompetitive, in the Commerce Business Daily, no later than 10 days before the issuance of solicitations, except in limited unusual circumstances. Further, except for procurements of utility services and procurements of educational services from nonprofit institutions, contracts in excess of $25,000 are not negotiated on a noncompetitive basis without prior review at a level higher than the contracting officer.

These procedures have worked satisfactorily and do not unduly affect defense procurement. In our opinion, it is not appropriate nor practicable to have two separate statutory requirements for the advance publicizing of proposed procurements.

Further, it must be remembered that publicizing proposed procurements in the Commerce Business Daily is not the primary method of acquainting interested firms with potential contract opportunities. Bidder's mailing lists are maintained at each purschasing office, and interested firms from these lists are furnished requests for proposals and invitations for bids at initial mailings. Any responsible firm will be placed on these lists upon its application to individual purchasing offices.

We, of course, support the intent of the bill which is to increase competition. Recognizing that attainment of more effective competition is one of the major challenges facing us today, it has been included as one of the 32 initiatives in the DOD Acquisition Improvement Program.

In July 1981 the military departments and defense agencies having procurement authority were requested to develop management objectives for the enhancement of competition and to submit their respective plans for achieving these objectives for review. To assure that all DOD components were following concepts and procedures that would produce meaningful results, this was followed up in November 1981 with direction that actions be taken to, among other things, (1) designate advocates for competition in all buying organizations, (2) insure that each commander understands his responsibility for insuring maximum feasible competition, (3) make competition in systems development and production a matter of special emphasis, and (4) develop procedures for identifying and publicizing significant achievements in competing contractual requirements. Their responses to these directions have been positive and evidence strong support for this initiative.

The possibility of obtaining the benefits of competition in the procurement of weapons systems is considered at all steps in the acquisition process. Among the techniques being used are dual or second sourcing, leader/follower, joint teaming, competitive parallel development, and encouraging competitive subcontracting.

Other procedures designed to enhance competition are: Maintaining up-to-date bidder's mailing lists; publicizing procurements over $10,000 as I discussed earlier; publicizing for sources to perform research and development; advance procurement plans; component breakout; spare part breakout program; encouraging capital investment; using commercial standards; procuring commercial products; and use of advance or progress payments. I believe these actions clearly demonstrate our com-

mitment to both enhance and achieve more effective competition in the acquisition of supplies and services.

While enhancement of competition is a long-term effort, our experience in fiscal year 1981 is encouraging. In 1981, 41 percent of our procurement dollars were awarded on the basis of price or design (technical) competition. This was 4 percentage points above fiscal year 1980 experience. Additionally, 23.5 percent of our procurement dollars were awarded as follow-on contracts to sources initially selected as the result or price or design competition. This was about 2 percentage points above fiscal year 1980 experience.

We also feel that the provisions of this bill may be counterproductive to our ongoing efforts to simplify our contractual documents and our contracting procedures. Success in these efforts should encourage more firms to compete for Defense business. We believe that our present lengthy and complex requests for proposals and contracts often aggravate and confuse contractors, inhibit competition, and to the administrative time and costs of the process. To overcome this problem, we have initiated action to develop, test, and implement a contract document simplification program. Our procedures will also have to be streamlined, which effort could be affected by the bill's provisions.

Another action we are taking in this area is to seek relief from the more burdensome requirements of governmental regulations. Our efforts here have been formalized under initiative No. 13 of the DOD Acquisition Improvement Program. It was considered that, over the past decade, the acquisition process has become overburdened with governmental legislation and requirements. Individually, these requirements may have worthwhile objectives; collectively, they impose a costly and burdensome requirement on industry and the acquisition process. Under this initiative, we are reviewing the various governmental requirements and regulations and are initiating actions to suggest amending or cancelling those adversely affecting the acquisition process. It may be appropriate to consider H.R. 5350 in this light.

It is my view that enactment of H.R. 5350 will not increase competition but will add another burden on the procurement process. Therefore, we oppose this bill.

This concludes my statement, and I will be most pleased to answer any questions you may have.

Senator PRYOR [presiding]. I would like to ask at this time the officials from the General Accounting Office jointly share with Mr. J. Elliott Barrow, president of JEBCO, Inc., the table at this time.

Senator Cohen and Senator Levin and the others have all had to leave and left me basically presiding at this time.

We are sorry we are running out of time. We apologize for the length of our interrogation of the previous witnesses. We don't want to cut you off unduly short.

Mr. Gilroy, I wonder if you might submit your full statement for the record, if I could make that request, and summarize your statement and/or your position on S. 2127. We will then ask Mr. Barrow and his associates for their commentary and we might ask one or two questions at the end.

Thank you.

TESTIMONY OF ROBERT M. GILROY, SENIOR ASSOCIATE DIRECTOR, PROCUREMENT, LOGISTICS, AND READINESS DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY SEYMOUR EFROS, GAO ASSOCIATE GENERAL COUNSEL FOR PROCUREMENT AND TRANSPORTATION LAW, AND KEVIN TAN3EY, GAO ASSIGNMENT MANAGER FOR COMPETITION REVIEWS; AND J. ELLIOTT BARROW, PRESIDENT, JEBCO, INC., ACCOMPANIED BY LEE H. HENKEL, JR., AND STANLEY H. HACKETT, PARTNERS, HENKEL, HACKETT, EDGE & FLEMING

Mr. GILROY. I would like first to introduce, Senator, on my far right, Seymour Efros, our GAO Associate General Counsel for Procurement and Transportation Law, and on my immediate right,

Kevin Tansey, GAO Assignment Manager for Reviews involving agency competitive contract award practices.

We will submit our formal statement for the record and I will read a brief summary at this time.

We are pleased to be here today to comment on S. 2127. We strongly support the bill and believe that it could, if properly implemented, be an effective framework for improving Federal procurement.

There are, however, some areas where we believe technical improvements are needed in the wording of the bill and in response to a recent committee request we will work with the committee on these matters.

As the committee requested, my formal statement provides background information on the extent of competition in the Department of Defense and civil agencies. We have also included charts showing trends in the level of conpetition as attachments I and II to that statement.

In summary, the trends for defense procurement, competition, and price competition specifically, have declined from the high levels achieved in fiscal years 1973–74 to a low point in 1980.

In 1981, this trend was reversed. Our analysis, however, shows this improvement was due to a change in the petroleum situation—the oil glut.

Our office has recently examined statistical samples of new, sole-source contracts over $10,000 awarded by both the Department of Defense and six major Federal civil agencies to assess the adequacy of their sole-source decisions.

Basically, both of these reviews showed that: One, many contracts were awarded sole source unnecessarily, and two, specific actions should have been taken to insure that competition was obtained when available.

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors identified in both reports included:

Ineffective procurement planning or the failure of contracting officers to perform adequate market research.

Inappropriate reliance of procurement officials on the unsupported statements of agency program, technical, or higher level officials.

In addition, both reports show that a lack of commitment to competition on the part of key agency personnel was a major problem.

S. 2127 proposes several important changes in the procurement statutes governing Federal agencies which address these and other problems. My formal statement describes in some detail the reasons why we support S. 2127. I will briefly highlight a few of these. First, the bill would remove the present strong statutory preference for sealed bidding and substitute statutory provisions that: First, focus on competition, whether achieved through sealed bids or competitive proposals, and second, seek to limit noncompetitive procurements.

We agree that it is competition, not just competition through sealed bidding, that should be emphasized. We also agree that noncompetitive procurements should be limited to very special and

well-defined circumstances and have specifically recommended this type of requirement in a recent report.

Second, the bill would strengthen procedures for publicizing prospective awards consistent with one of our recent recommendations that we consider especially important. The bill would require for other than small purchases that notices be published by the Secretary of Commerce and include a statement inviting bids, proposals, or other responses within 30 days.

We believe that agency practices relating to publicizing notices in the CBD are an area of serious abuse which results in potential competitors being effectively restricted from competing. Therefore, we strongly support this provision in the bill.

Third, the bill requires agencies to use advance procurement planning and market research to obtain competition. These are areas which our work has identified as major deficiencies needing correction.

As noted earlier, there are several areas where we believe the bill could be improved. The most important of these relates to the term "competitive procedures," defined in the bill as procedures under which an agency enters a contract after soliciting bids or proposals from more than one source capable of satisfying the agency's needs. It is likely that this definition will be interpreted to mean that such awards are "competitive" even if the agency received only one bid or proposal. This could have a dramatic but deceptive effect on competitive statistics.

More importantly, categorizing one-bid or one-proposal awards as "competitive" will often have the effect of covering up whatever problems inhibited receipt of more than one offer.

Since the procurement data system does not indicate how many offers were received, there is no easy way to identify these "competitive" awards based on one offer so as to analyze and correct whatever problems might have lead to the failure to receive more than one offer. Therefore, these problems will likely be repeated.

To remedy this situation, we suggest that the bill be revised to include a minimum standard for awards to be considered competitive: The receipt by the agency of at least two offers on each solicitation from offerors regarded as capable of meeting the Government's needs.

The other problems we have with the bill are technical and as requested, we will be discussing these with the committee staff.

This concludes my prepared statement. I will be happy to address any questions you may have.

Senator PRYOR. Thank you.

I wonder if any of your colleagues at that time would have any statement or comment.

Before we go into any questions, let us hear from Mr. Barrow or his spokesman.

Mr. HENKEL. Senator, thank you, very much.

Senator PRYOR. Is Mr. Barrow from Georgia?

Mr. BARROW. Yes.

Senator PRYOR. I understand you are a constituent of Senator Mattingly and Senator Nunn, who are both fine members of this committee, neither of who could be here today.

I think Mr. Mattingly may be hospitalized; or under the weather. I don't want to spread any rumors if that is not correct. But we are proud to have you both here today and look forward to your statement.

I wish you could summarize if possible.

Mr. HENKEL. We will be very brief.

Senator Rudman earlier referred to a contract manufacturer of furniture who is concerned about the business of competition and on my left, there he sits in all his glory, that small businessman; a man who started, when I first knew him, with a hope and a mortgage of $25,000, a manufacturing business.

He is sort of the epitome of successful small business in America, I would say. He is one of the best suppliers of GSA. He is the biggest employer in his small town; 200 or 300 employees, 70 percent of whom are minority.

He is the essence of business in America and he does seriously ask in this whole process, is he going to be able to continue bidding for Government business? We are seriously concerned—we have been concerned for 1½ years—that there is a movement in Washington to eliminate people like him from bidding in this whole process.

We approve and applaud S. 2127. Of course we want competition. He is not afraid of competition; from big business, small business, any kind of business. He is one of those rough and tumble entrepreneurs who only wants a chance to compete.

That is all we have been arguing for 1½ years in Washington. And we are concerned with this one simple question.

When you take S. 2127 and read it, it is fine. But then you read the recent Executive Order 12352, which says that the Government must expand the purchase of available commercial goods and services. Like Senator Rudman said, regarding commercial goods and services, if you are talking about a cake of soap, or a bottle of worchester sauce—an effective case can be made. But to our mind, if you have a statute or a regulation passed with a preference for commercial items, in at least the metal office furniture industry, then it is a statutory preference for big business produced items as against small business produced items.

We don't care how the Government specifies, whether it is a commercial-type of specification, whether it is a functional specification, or whether it is the old style specification. All we want is to be able to bid on it. About a year ago we ran across some CID's prepared by GSA in our area which had a requirement that before you could bid you had to sell in the commercial marketplace.

JEBCO doesn't sell in the commercial marketplace. In the metal office, furniture business, you are either big and selling in the commercial marketplace or you are small and making items to contract. We cannot get into the commercial marketplace.

If you are going to specify commercial items and make it a requirement that the bidders are in the commercial marketplace, we are out of business. That is our concern. We have asked this question. We have posed it over and over again to the OMB, to the OFPP, to the White House, to the GSA.

I will submit for the record all of our correspondence.[1] We have gotten polite "no answers" back. I heard those described earlier.

Our question is simply this: Suppose you have two manufacturers, one of whom makes commercial items, and one of whom is a manufacturer by contract to the Government. Both are capable of making, let's take a metal file cabinet, of comparable, quality; both of them can do it.

The Government issues a functional specification which the commercial item will meet and the contract manufacture item will meet. Our question to all of these people is, can we bid on it? Are we prohibited from bidding just because we don't sell in the commercial marketplace? That is the essence of our question.

If we can get that answered, we will go back to Georgia. But nobody will answer our question. That is why we are here again today.

Senator PRYOR. It is a shame you have to come to a Senate committee to have that question answered. I am interested in your plight. Is this Executive order now in place? In other words, are we operating under this Executive order now?

Mr. HENKEL. Yes.

Senator PRYOR. When was that issued?

Mr. HENKEL. It was issued in March 1982.

Senator PRYOR. So it is a recent order?

Mr. HENKEL. That is correct.

Senator PRYOR. Basically, your concerns and frustrations have fallen on deaf ears within the Government and the bureaucracy; is that correct?

Mr. HENKEL. That, essentially, is correct. We have been listened to without any question. Everybody understands our problem. The answer that usually comes back is that it is up to each individual agency to decide how to issue specifications. We don't object to how they write or issue specifications, but everybody gets the focus on the wrong end of our problem.

We don't object to a commercial like specification. If the Government wants to move toward products that the commercial people can bid on, great, we will compete against them. However, we don't want to be eliminated from bidding as a supplier simply because we don't happen to sell in the commercial marketplace if we can produce an equal product.

Senator PRYOR. Did your colleague have a statement he would like to make?

Mr. HACKETT. I was getting ready to butt in.

Senator PRYOR. Feel free. We are getting to the informal part of the hearing now. [Laughter]

Mr. HACKETT. Mr. Chairman, if I can put this in context, as my partner indicated, we really have no problem with S. 2127. As we understand it, it doesn't have any preference in favor of commercial products, and against contract manufactured products. Under S. 2127, JEBCO would be intitled to bid.

Back in, I guess, February of this year, the OMB finally came up with a uniform Federal procurement system. They proposed legisla-

[1] See p. 86.

tion. I don't think it has been introduced, but it was proposed that it would have a statutory preference in favor of commercial items.

We strongly oppose that. The OMB's proposed procurement system seems to have gotten sidetracked on turf fights, and for a lot of other reasons, but an Executive order was issued that gives a preference in favor of commercial items. That is Executive Order 12352.

We would again endorse S. 2127 as we understand it. It would let us compete. That is all we want to do.

Senator PRYOR. We very much appreciate your comments. While we have Mr. Gilroy here, I wonder if he might make a comment on the plight of these gentlemen. I know generally they have an advocate or at least as near an advocate as possible in the General Accounting Office for the Small Business people and for people who want to do business with the Government.

I wonder if you might have comments?

Mr. GILROY. I think, basically, we wouldn't believe it would make sense to drop the statutory preference for sealed bidding and to pick up another statory preference for a commercial item.

We believe that competition ought to be competition: That everyone who so desires and is capable ought to have an opportunity to participate in the Government's business.

Senator PRYOR. You have found a friend already.

Mr. BARROW. Good. One thing I would like to say, is that GSA—I think Lee touched on this—1½ years ago, long before OFPP even let their findings become public, they let out proposed commercial item descriptions, which was all right with me, except they proposed that in order to bid on a particular product which may be 1,000 units, you had to sell 1,000 units commercially and you had to turn in your price sheets or your brochures.

The contract manufacturer manufactures items for other people. They put their name on it. So if the commercial item preference it were interpreted on the basis of the proposed CIS's, no contract manufacturer would ever qualify to bid.

Senator PRYOR. Where did the Executive order come from? What is the origin of it? Do we know?

Mr. BARROW. You mean as far as GSA is concerned? Or the Executive order? It came out of the White House.

Mr. HACKETT. It came out of the White House, I presume OMB recommended it.

Senator PRYOR. It was basically dealing with GSA?

Mr. BARROW. Unfortunately, OFPP, sir, in their original proposal for a uniform procurement system, cited the metal office furniture industry as being the culprit, the example where you should have commercial items.

Senator PRYOR. About 1½ years ago we had some pretty hot hearings about one office furniture supplier.

Mr. BARROW. I am not him.

Senator PRYOR. I know that. I am glad you are not. [Laughter.]

The name of the company was Art Metals. I wonder if you happen to be acquainted with those people?

Mr. HACKETT. In response to your earlier question, the Executive order was issued on March 17, 1982, and it appears to have applied

across the board to the procurement process, and, yes, we are familiar with Art Metal.

Senator PRYOR. Thank you.

I would like to say thank you for taking your time and resources and energy to come before this committee. We will certainly take this under advisement and hopefully your problems can be solved.

Mr. Gilroy, would either of your colleagues or yourself have any comments?

We would like to thank you, too, for coming to testify in support of this legislation. Hopefully, we can work together on those changes that you will suggest to accomplish the purpose that we do need to accomplish.

Do you have any other comments?

Mr. GILROY. We have no further comments.

Senator PRYOR. We are very appreciative of your time and efforts this morning.

[The prepared statements of Messrs. Gilroy and Henkel, and correspondence submitted by Mr. Henkel, follow:]

PREPARED STATEMENT OF ROBERT M. GILROY

Mr. Chairman:

We are pleased to be here today to comment on S.2127. We strongly support the bill and believe that it could, if properly implemented, be an effective framework for improving Federal procurement. There are, however, some areas where we believe technical improvements are needed in the wording of the bill and in response to a recent Committee request we will work with the Committee on these matters.

MAGNITUDE OF THE PROBLEM

The Committee has asked us to provide some background information on the extent of competition in the Department of Defense and civil agencies.

To the extent data was available we have analyzed DOD procurements over the last 10 years to identify competitive and noncompetitive procurements. Competition (of all types) reached a high of 43.6 percent of all DOD procurement dollars in fiscal year 1974 and declined to a low of 32.9 percent in fiscal year 1980. It then climbed again to a level of 36.6 percent in fiscal year 1981. Addressing only price competition, we find it has declined from a high of 34.4 percent in fiscal year 1973 to a low of 24.9 percent in fiscal year 1980 and then recovered somewhat to 29.7 percent in fiscal year 1981. (See Attachment I.)

DOD shows improvement in fiscal year 1981 in the level of competition and specifically in price competition, which increased almost 5 percent in one year. Our analysis, however, shows this improvement was due to a change in the petroleum

situation (the oil glut). In 1980, petroleum accounted for 10 percent of the value of DOD's procurements and was 21 percent competitive. In 1981, it accounted for 14 percent of DOD's procurements and had become 66 percent competitive. Except for this increase in competition on petroleum products, the level of competition in DOD has declined. 1/

GAO has previously reported that the primary reasons for the decline in DOD's level of price competition during the fiscal year 1972-78 period were (1) increased spending on and a concurrent loss of competition for procurement of petroleum and nuclear submarines, (2) increased use of design and technical competition for major weapon systems, and (3) greater emphasis on set asides for businesses owned and controlled by socially or economically disadvantaged persons.

For civil agency procurements, data on competition is only available for fiscal years 1979-81 and it shows that competition declined from 52 percent to 46 percent during that period. (See Attachment II.)

In fiscal year 1981, Federal Government contract awards exceeding $10,000 in value totaled $125.7 billion, according to the Federal Procurement Data Center, which is the official Federal procurement data base. Approximately $69 billion of the total (or 55 percent) was categorized as negotiated

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1/We have adjusted the DOD data for fiscal years 1979 through 1981 to correct for the reporting deficiencies discussed in our report, "Reporting Competition in Defense Procurements--Recent Changes Are Misleading," dated March 8, 1982 (GAO/PLRD-82-45).

noncompetitive. Of this amount about $54.2 billion (or 79 percent) was awarded by the Department of Defense, and about $14.8 billion (or 21 percent) was awarded by Federal civil agencies. About $22.3 billion (or 32 percent) of the $69 billion was obligated by defense and civil agencies for new contract actions and the remaining $46.7 billion (or 68 percent) was for actions under existing contracts, such as modifications. About $5.8 billion of the $22.3 billion was for new noncompetitive Buy Indian, 8(a) and follow-on awards after competition. New contract actions are especially significant decisions because they limit the Government's choices when contract modifications or follow-on new contracts are necessary.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Our Office has recently examined statistical samples of new, sole-source contracts over $10,000 awarded by the Department of Defense and six major Federal civil agencies to assess the adequacy of their sole-source decisions. The civil agencies were the National Aeronautics and Space Administration; the Veterans Administration; and the Departments of Energy, Interior, Transportation, and Health and Human Services.

The reviews showed that the Department of Defense and these major civil agencies frequently did not base their contract awards on competition to the maximum extent practical. A July 1981 report 1/ showed that the Department of Defense should have competed 25 (or 23 percent) of the 109 new, sole-source

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1/"DOD Loses Many Competitive Procurement Opportunities," dated July 29, 1981 (GAO/PLRD-81-45).

contracts GAO reviewed. We estimated that DOD lost opportunities to obtain available competition on about $289 million in new fiscal year 1979 contract awards. In an April 1982 report 1/ we estimated that for the six civil agencies reviewed competition was feasible on 32 percent of the new, sole-source contracts in our universe. We also noted that an additional 8 percent could have been competitive with better agency planning or management. We estimated that the six civil agencies lost opportunities to obtain available competition on $148.5 million or about 28 percent of the dollar value of our universe. The dollar amounts for both defense and civil agencies represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

The percentage of civil agency sole-source contract awards on which competition was found to be feasible varied from a low of 20 percent at HHS and 21 percent at NASA to a high of 73 percent at the Department of Energy and 49 percent at the Department of Transportation.

Basically both of these reviews showed that (1) many contracts were awarded sole-source unnecessarily, and (2) specific actions should have been taken to ensure that competition was obtained when available.

1/"Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting," dated April 7, 1982 (GAO/PLRD-82-40).

CAUSES OF MISSED OPPORTUNITIES
TO OBTAIN COMPETITION

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors identified in both reports included:

--Ineffective procurement planning or the failure of contracting officers to perform market research adequate to ensure that sole-source procurement was appropriate.

--Inappropriate reliance of procurement officials on the unsupported statements of agency program, technical, or higher-level officials.

In addition, both reports show that a lack of commitment to competition on the part of key agency personnel was a major problem. Instances of overly restrictive specifications and failure to use available data packages to obtain competition were also found.

S.2127

Senate Bill 2127 proposes several important changes in the procurement statutes governing Federal agencies which address these and other problems. First, the bill would remove the present strong statutory preference for sealed bidding and in its place substitute statutory provisions that (1) focus on competition, whether achieved through sealed bids or competitive proposals, and (2) seek to limit noncompetitive procurements. We agree that it is competition, not just competition through sealed bidding, that should be emphasized. We also agree that noncompetitive procurements should be limited to very special

and well-defined circumstances and have specifically recommended this type of requirement in a recent report. 1/

Second, the bill would strengthen procedures for publicizing prospective awards consistent with one of our recent recommendations that we consider especially important. 2/ The bill would require for other than small purchases that notices be published by the Secretary of Commerce and include a statement inviting bids, proposals or other responses within 30 days.

In our previously mentioned report we analyzed civil agency officials' use of the Commerce Business Daily on a statistical sample of noncompetitive contracts. We found that agency officials publicized a notice which invited competition on the prime contract on only 2 percent of the awards. Meanwhile, they publicized a preaward sole-source notice, which stated that the Government intended to negotiate with a particular contractor, on 39 percent of the awards. These were in lieu of notices inviting competition. These sole-source notices are published for information purposes, such as alerting potential subcontractors to subcontracting opportunities. Although this purpose is worthwhile, we believe such notices fail to encourage additional proposals on the prime contract. Even less satisfactorily, no preaward notices at all were publicized for the remaining 60 percent of the awards and usually there was no valid exception to the regulatory requirement to publicize such notices. We

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1/See page 22 of GAO/PLRD-82-40, previously cited.

2/See page 33 of GAO/PLRD-82-40, previously cited.

believe this is an area of serious abuse which results in potential competitors being effectively restricted from competing. Therefore, we strongly support this provision in the bill.

Third, the bill requires agencies to use advance procurement planning and market research to obtain competition. As previously discussed, our recent reviews of defense and civil agencies' sole-source contracts identified ineffective procurement planning and inadequate market research as major deficiencies needing correction.

Fourth, section 303(a) of the bill requires agencies to specify their needs and solicit offers without bias or favoritism with respect to any prospective source. In addition, section 311(a) forbids the specifications in solicitations for sealed bids or competitive proposals to include restrictive provisions or conditions that are not necessary to achieve agency needs. Overly restrictive specifications are a persistent problem. We recently recommended that the heads of all major Federal departments and agencies take steps to better ensure that contract specifications are not unnecessarily restrictive. Following are two examples from our recent reviews of noncompetitive contracts.

Example #1

The Sacramento Army Depot, Sacramento, California, used specifications which exceeded its minimum needs. As a result, it bought 20 closed-circuit TV systems for $153,000 noncompetitively, even though other competitors offered products that met the Army's needs. Specifically, system requirements for camera

weight and picture resolution did not necessarily represent the Army's minimum needs.

The Army established 3 pounds, plus or minus 0.5 pounds, as its minimum camera weight need. However, its only desire was to buy a camera that did not unnecessarily hamper a soldier's ability to do basic tasks. Army officials agreed that cameras weighing less than 2.5 pounds or more than 3.5 pounds might work as well. Thus, the camera weight, as stated on the noncompetitive certification, represented only a desired weight, not the Army's minimum needs.

On the basis of testing two cameras, one having a line resolution of 600 and the other 800, the Army determined that a 600-line camera did not meet its needs. The Army then established 800 as the required line resolution. However, it did not test resolutions between 600 and 800. The possibility exists, and the Army agreed, that other cameras with resolutions of less than 800 but more than 600 probably could do the job.

Because the camera weight and line resolution appeared as fixed requirements, the Army contracted noncompetitively despite the availability of other cameras that might have done the job.

Example #2

The Bartlesville Energy Technology Center, Department of Energy, awarded a sole-source contract, initially obligating $218,000, to study a patented process for determining the amount of oil remaining in an abandoned reservoir. The Department claimed that the sole-source contractor was unique because it was the only nonpetroleum company having the required license

granted by the patent holder. We contacted the company that held the patent and found it did not require that firms hold licenses to use the patented process in conducting a study as set forth in the contract. We concluded that the Department had unnecessarily restricted competition by not identifying the minimum requirements correctly. Other firms told us they would have competed for the award if they had been given the opportunity. The agency contracting officer agreed that competition should have been obtained.

In addition to unnecessarily restrictive wording in specifications and similar documents we identified a more serious and widespread restriction on competition. That is, agency officials often made arbitrary decisions that no capable firms other than the sole-source were available and thus did not attempt to attract other sources. As a result, only one source usually received the solicitation for noncompetitive procurements. If agency officials take actions prescribed by S.2127 to publicize prospective awards, this will remove a significant barrier to competition. The actual attraction of new sources will only be forthcoming, however, if specifications do not include restrictive features which are nonessential to meeting the Government's needs.

Fifth, the bill provides a Government-wide ceiling of $25,000 for small purchases. The Congress, in December 1981, raised the small purchase ceiling for the Department of Defense to $25,000. This bill would also raise it for civil agencies, which are currently held to the $10,000 ceiling which the

Congress established in 1974. We support raising the ceiling to $25,000 Government-wide as long as reasonable competition is achieved. We believe the additional purchases to be made under simplified procedures will save administrative costs and reduce the paperwork burden on both the Government and small business.

The bill allows the Administrator for Federal Procurement Policy to adjust the $25,000 ceiling. While we support this approach, we believe that as a matter of policy any future adjustments should be made in consultation and coordination with the Congress, the agencies and the private sector.

As noted earlier, although we endorse S.2127 in general, we believe there are several areas where the bill could be improved. The most important of these relates to the term "competitive procedures," defined in the bill as procedures under which an agency enters a contract after soliciting bids or proposals from more than one source capable of satisfying the agency's needs. It is likely that this definition will be interpreted to mean that these awards are "competitive" even if the agency received only one bid or proposal. This could have a dramatic but deceptive effect on competitive statistics.

More importantly, categorizing one-bid or one-proposal awards as "competitive" will often have the effect of covering-up whatever problems inhibited receipt of more than one offer, such as restrictive specifications; poor timing of the procurement, perhaps because of inadequate market research; or the failure to publicize the prospective award. In other words, classifying the awards as "competitive" groups them with awards

on which there was more than one offer. Since the procurement data system does not indicate how many offers were received, there is no easy way to identify these "competitive" awards based on one offer so as to analyze and correct whatever problems might have lead to the failure to receive more than one offer. The failure to identify and correct these problems will result in their being repeated.

To remedy this situation we suggest that the bill be revised to include a minimum standard for awards to be considered competitive: the receipt by the agency of at least two offers on each solicitation from offerors regarded as capable of meeting the Government's needs.

The other problems we have with the bill are technical and as requested, we will be discussing these with the Committee staff.

This concludes my prepared statement. I will be happy to address any questions you may have.

ATTACHMENT I

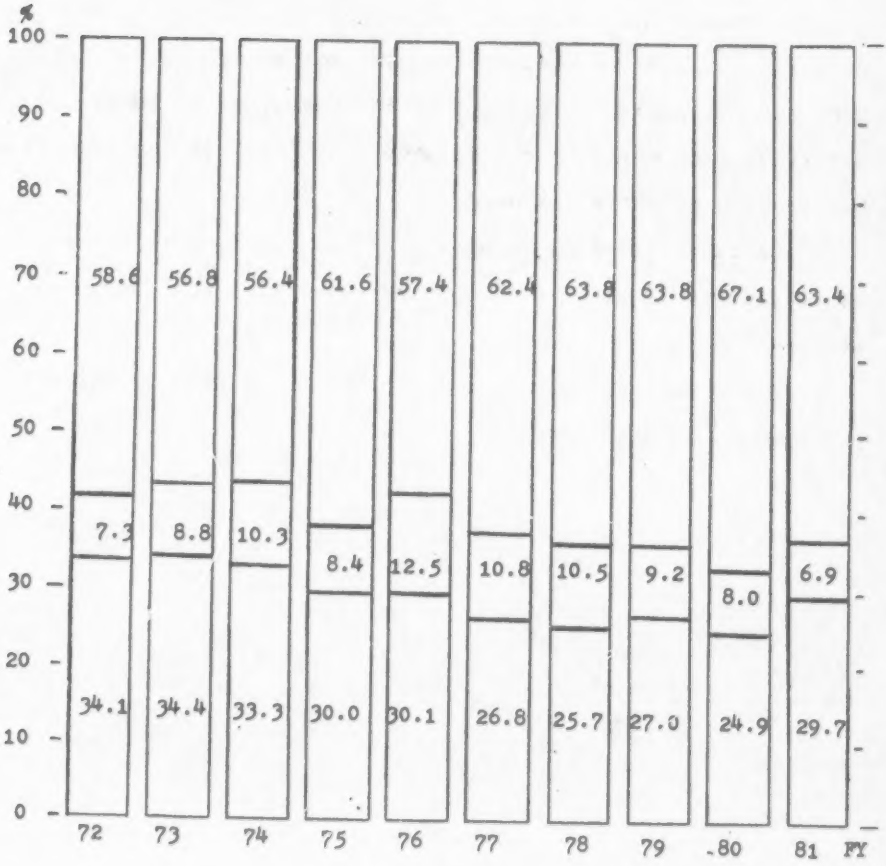
ATTACHMENT I

DOD MILITARY

PRIME CONTRACT AWARDS

FY 72 - 81

NONCOMPETITIVE (TOP)
DESIGN AND TECHNICAL COMPETITIVE (MIDDLE)
PRICE COMPETITIVE (BOTTOM)
PERCENT OF DOLLARS



ATTACHMENT II

ATTACHMENT II

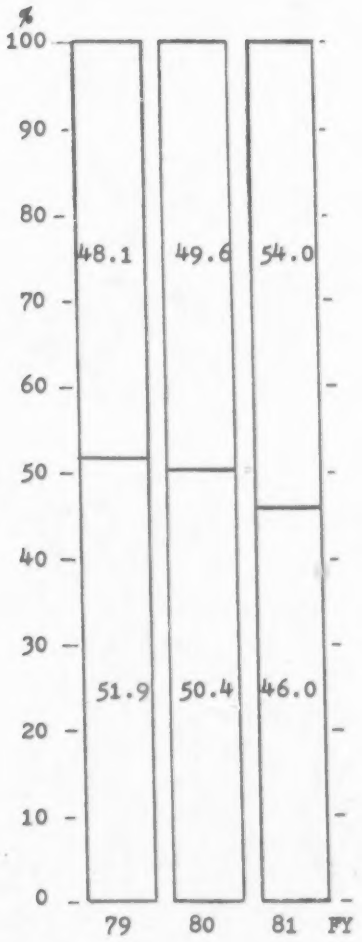
CIVIL AGENCY AWARDS

FY 79 - 81

NONCOMPETITIVE (TOP)

COMPETITIVE (BOTTOM)

PERCENT OF DOLLARS



ATTACHMENT III

ATTACHMENT III

DOD MILITARY

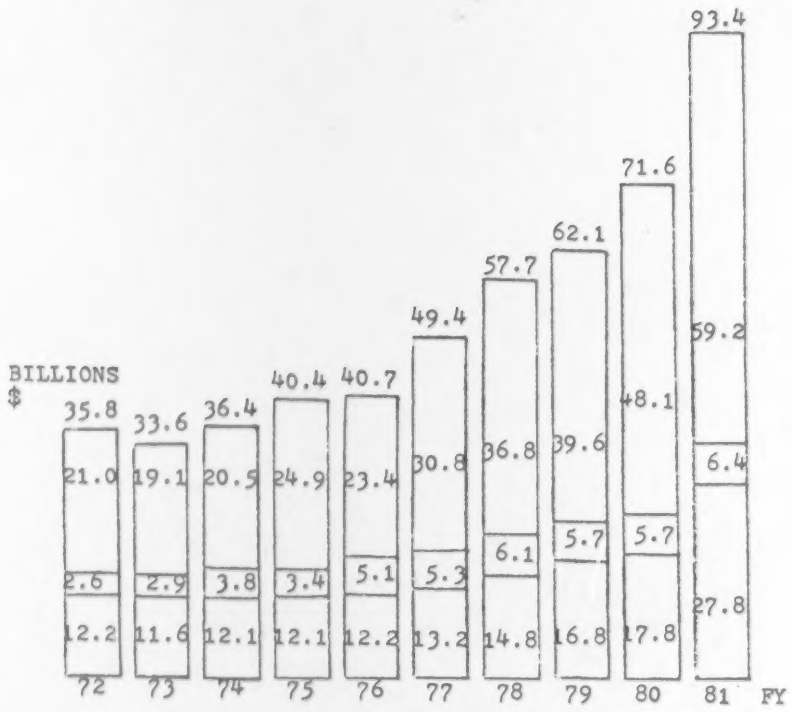
PRIME CONTRACT AWARDS

FY 72 - 81

NET VALUE IN $ BILLIONS

INCLUDES AWARDS UNDER $10,000

EXCLUDES INTRAGOVERNMENTAL



ATTACHMENT IV

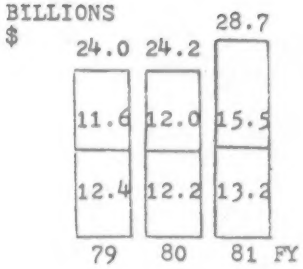
ATTACHMENT IV

CIVIL AGENCY AWARDS

FY 79 - 81

NET VALUE IN $ BILLIONS

EXCLUDES AWARDS UNDER $10,000



STATEMENT OF
LEE H. HENKEL, JR.,
COUNSEL FOR JEBCO, INC. BEFORE THE
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
June 29, 1982

Mr. Chairman and Members of the Committee:

I am Lee H. Henkel, Jr. of the law firm of Henkel, Hackett, Edge & Fleming, P.C. of Atlanta, Georgia. I am here today on behalf of our client, Jebco, Inc. (JEBCO), a contract manufacturer of metal office furniture located in Warrenton, Georgia. I am accompanied by Mr. J. Eliott Barrow, owner of Jebco, and by my partner, Stanley H. Hackett.

As I noted, Jebco is a contract manufacturer located in Warrenton, Georgia. It has been in business since 1956 and has been operated and controlled by Mr. Barrow since that time. Jebco manufactures metal office furniture, principally for sale to the United States Government (GSA), and postal storage and handling equipment (mailboxes, etc.) for the U. S. Postal Service (USPS). Through the years, Jebco has also made sales to the military. Jebco's experience with the Federal Government in connection with the quality of its products is a matter of record and is excellent. Jebco's products are primarily made with sheet metal, and in the industry, the products have been known as "metal case goods". Jebco makes some commercial sales each year, but such sales are negligible in terms of its total sales volume.

Jebco does not manufacture a full line of metal office furniture on an on-going basis. However, on a contract basis, Jebco, in the past, has manufactured double and single pedestal office desks; clerical and secretarial desks; card file cabinets; map and plan filing cabinets; tables and stands; costumers; various filing cabinets; mail boxes; USPS workroom furniture; lockers; wardrobes; and a variety of other office furniture. The basic technology involved in the production of this type of furniture is readily transferable from one item to another. Jebco is a "small business" under any definition of the term, including the operative definition of the Small Business Administration for its industry classification (500 or fewer employees). Jebco's present capitalization is approximately $2,500,000. Its sales volume has ranged from $5,000,000 to $8,000,000 in recent years. Jebco's present capitalization - and any reasonable capitalization that could be anticipated - is simply insufficient to permit on-going production of the broad line of furniture that would be essential to achieve and maintain viable commercial sales on an on-going basis.

Employment in metal office furniture manufacturing is an entry level job in the industrial employment marketplace. The bulk of the work does not require extensive training, and work at Jebco is typically the first industrial work undertaken by its employees. Many of Jebco's employees move to more advanced manufacturing and industrial jobs after initial training at Jebco. Jebco thus provides a particularly important job opportunity in

its home county, and, indeed, in a five county area of eastern Georgia. For the record, Warren County, Georgia, the home county of Jebco, has been designated as a labor surplus area by the U. S. Department of Labor.

Jebco normally employs 200-250 people; employment has been as high as 350 in recent years. Jebco's minority employment normally averages 70%. For the last several years, Jebco's employment has been reduced considerably. The reduced employment has been attributable directly to the curtailment in GSA purchases of metal office furniture which has existed for the last several years. Only recently, GSA once again began buying furniture and Jebco was fortunate to be low bidder on several contracts. However, if Jebco is precluded from bidding on future GSA purchases, it will be unable to operate. Jebco's sales to the U. S. Postal Service are insufficient, standing alone, to sustain operations over the long term.

With that background, I would like to turn to the proposed Uniform Federal Procurement System (UFPS), with some additional comments regarding S. 2127, introduced by Senators Cohen, Roth and Levin on February 23, 1982, and Executive Order 12352, signed by President Reagan on March 17, 1982.

The proposal for a uniform federal procurement system has been described by some as representing "a considered, well thought-out position." We agree. However, we find extremely

disturbing implications in the "considered, well thought-out position" ultimately reached by the proposal.

From Jebco's standpoint, the most significant change in the proposal, from current law and practice, is the creation of a new, statutory preference for "the use of commercial products to meet the government's needs." Commercial products are not specifically defined in the legislation most recently proposed by the Administration. However, the earlier draft legislation defined commercial products as "...property or services which are regularly sold or made available to the public at established catalogue or market prices."

Implementation of this commercial items preference will discourage competition in the metal office furniture industry. Office furniture is a somewhat unique product in that it generally must coordinate. In other words, desks, credenzas, file cabinets and other furniture in an office typically must be the same color and style and be otherwise compatible. Commercial buyers rarely buy one type of metal office furniture which does not match others. As a result, to be viable in the commercial market place, a producer must offer a fairly complete line of metal office furniture at all times. This requires capitalization and a sales volume much greater than Jebco has, or realistically could hope to have. In the past, the Federal Government has achieved desired coordination through specification. Jebco has been able to compete and to bid and produce

particular items to specification. Under the commercial items preference, the Federal Government would still achieve coordination through specification, although the new specifications may be less detailed than in the past. Jebco has no objection to commercial specifications or functional specifications per se. Jebco could manufacture quality products which would meet these specifications at a competitive price. However, Jebco and similarly situated small producers, in effect, would be precluded from bidding under the proposed statutory commercial items preference, regardless of their ability to produce pursuant to the new specifications.

The commercial items preference appears to be based on the presumption that if an item is offered in the commercial market place it is "good". Conversely, if an item is not offered in the commercial market place it is "bad". However, all that is really being done with the preference is that one set of specifications (i.e., commercial industry specifications) is being substituted for another set (i.e., GSA or DoD specifications). Furthermore, the only specific assurance of quality is a representation by a bidder that the product it proposes to supply is the same grade as supplied in the commercial market place. Jebco can make the equally valid representation that the product it would propose to supply to the Government is the same grade as that supplied by others to the Government and in the commercial market. The bottom line on quality is the same in both cases - the Government

is looking to the integrity of the manufacturer and its ability and willingness to repair or replace products which may be defective.

The proposed statutory preference for commercial products effectively would exclude a large body of current suppliers from competing in the future for government business. Again I refer to contract manufacturers, such as Jebco, who typically bid to supply volume purchases pursuant to some type of specification and who do not maintain a full inventory for sale to the general public on an ongoing basis at established prices.

A contract manufacturer invariably can beat a commercial manufacturer on price for a specified product, with quality and other relevant factors defined by specification. The new statutory preference, in excluding such contract manufacturers from even bidding for government business, is blatently anti-competitive. Please understand that in practical effect, a statutory preference in favor of one type of product will operate as a statutory exclusion of others.

However, to deal with this obvious objection, the proposed UFPS would simply redefine competition from the "full and free" standard, which has been the federal standard in one form or another since the early 1800s, to the "efficient and effective" standard. The proposal makes clear that this new standard of competition could be satisfied by going to as few as two producers.

For years, ethical and qualified contract manufacturers have produced quality products, desired by the government, at competitive prices. Yet, under the proposal there will be a statutory preference against such manufacturers simply because they may not regularly sell to the public.

A traditional response to competition is to reduce prices; the response articulated in the proposal is to redefine certain competitors out of the system. We find that quite disturbing, and sincerely pray that this Subcommittee - and this Congress - will not go along with such a blatent grab for the public dollar.

Mr. Chairman, we have similar concerns with respect to S. 2127 and Executive Order 12352.

S. 2127 would amend the Federal Property and Administrative Services Act of 1949, with comparable amendments to Title 10 of the United States Code. From Jebco's standpoint, the critical provisions of S. 2127 are those which would change the federal standard of competition to "efficient and effective", and which would specify that competition exists under procedures where a purchase is made, or a contract entered into, after providing the solicitation documents to more than one source. The implication is clear that competition will be deemed to exist when as few as two sources are invited to bid, and that the agencies will have considerable discretion in selecting those sources. We note that S. 2127 does <u>not</u> contain a stated, statutory preference for commercial items. Accordingly, under S. 2127 standing alone, Jebco

would not be precluded from bidding - assuming it were one of the favored sources selected by the particular agency.

However, when S. 2127 is considered together with Executive Order 12352 - which has already been promulgated - the effect is very close to the statutory preclusion contained in the proposed UFPS. Executive Order 12352 provides in part that the Government shall "establish criteria for enhancing effective competition..." and that these criteria shall include such actions as "...expanding the purchase of available commercial goods and services." We already know that there is a certain amount of Orwellian "double-speak" here. "Effective competition" clearly means something less than "full and free" competition. When we have statutorily permissable limited competition as contained in S. 2127, and an Executive Order that requires the expanded purchase of commercial items, then it is not too difficult to conclude that manufacturers such as Jebco will find themselves excluded from the system.

All we ask, Mr. Chairman, is that under whatever system is ultimately designed, we have the right to compete. We are extremely concerned that efforts are underway to deny us this right. We resent it, we will resist it, and we sincerely hope this Congress will resist it.

That concludes my formal statement. We would be delighted to respond to any questions the Committee may have.

Thank you.

THE WHITE HOUSE,
Washington, D.C., May 24, 1982.

Mr. LEE H. HENKEL, Jr.,
Henkel, Hackett, Edge & Fleming,
Peachtree Center Tower, Atlanta, Ga.

DEAR MR. HENKEL: Thank you for your note of May 20 concerning your client's interest in the details of the Federal procurement system. Your inquiry has become so detailed and related less to policy than to the problems of one specific client, I feel it appropriate to refer it to Mr. Don Sowle, Director of the Office of Federal Procurement Policy.

He and his staff can devote the time and resources to give your inquiry the consideration it deserves.

I am sure that if there is a matter of broader policy implication appropriate for consideration by this office that Mr. Sowle will apprise me of it.

Sincerely,

EDWIN L. HARPER,
Assistant to the President for Policy Development.

HENKEL, HACKETT, EDGE & FLEMING,
Atlanta, Ga., May 20, 1982.

Re Final proposal for uniform Federal procurement system.

Mr. EDWIN L. HARPER,
Assistant to the President for Policy Development,
The White House, Washington, D.C.

DEAR MR. HARPER: Thank you for your May 13, 1982 response to my letter of April 27, 1982 concerning the captioned matter.

In my letter of April 27, I posed a question by very specific example as to the effect of the proposed commercial items preference on contract manufacturers. I am not sure that my question was really answered. Let me rephrase and sharpen the question in light of your response as follows:

Assume A and B are reputable manufacturers of metal office file cabinets. They traditionally have sold their products solely to the government on a bid basis pursuant to government specification. They do not sell in the commercial market. Assume further that C and D are reputable manufacturers of metal office file cabinets. They traditionally have sold their products solely in the commercial market. C and D have not bid on government contracts principally because their commercial products of comparable quality do not technically meet previous government specifications. Assume further that a government agency determines to purchase 5,000 metal office file cabinets. After a "thorough job of market research", the government determines it is desirable to encourage C and D to bid to the government. It publishes a "functional specification," as defined in proposed 41 U.S.C. Section 252(c), setting forth a statement of the qualitative nature of the property required, as well as certain minimum essential characteristics and standards to which the cabinets must conform. C and D's commercial line of cabinets meet the standards of the "functional specification". A and B also are fully capable of manufacturing cabinets that meet the standards of the "functional specification".

Will A and B be permitted to bid on this contract or will they be precluded because they do not regularly sell in the commercial marketplace?

In your letter of May 13, 1982, you stated that: "all responsible suppliers meeting the terms and conditions of Federal IFB's will continue to be able to bid."

In view of this, and the commercial item emphasis, perhaps our previous question could be stated another way:

Will the "terms and conditions" of Federal IFB's in situations as above outlined include a requirement that the suppliers of the cabinets sought must also maintain commercial sales of that item?

With all due respect, we feel that the administration should candidly answer these questions. Obviously our client, Jebco, Inc., is either the A or B in the Example. We know from prior experience over many years that A and B's bids may well be substantially lower than C and D's in the situation outlined. But, can they bid?

Sincerely,

LEE H. HENKEL, Jr.

THE WHITE HOUSE,
Washington, D.C., May 13, 1982.

Mr. LEE H. HENKEL, Jr.,
Henkel, Hackett, Edge & Fleming,
Peachtree Center Tower, Atlanta, Ga.

DEAR MR. HENKEL: Thank you for your April 27, 1982, letter. The concerns expressed in your letter about the impact of the Uniform Federal Procurement System (UFPS) proposal on small businesses are appreciated.

One of the major goals of the UFPS proposal is to increase competition. The proposal is designed to open up the Federal procurement process and to attract all qualified businesses to compete for Government contracts. The commercial products policy contained in the UFPS proposal is consistent with this objective. The policy stems from recommendations made by the congressionally-mandated Commission on Government Procurement (COGP). The COGP concluded, after a vast study of Federal procurement practices, that the Government should acquire more commercial products instead of buying products tailor made to Federal specifications.

The problems that have been encountered, to date, by some small businesses as a result of the shift toward buying more commercial products, have been brought about by the manner in which the policy is being implemented. The problems are not attributed to the commercial products policy per se. The policy, when properly implemented, as noted in the UFPS proposal, requires a thorough job of market research prior to changing procurement modes for individual commodity lines such as metal office furniture.

Market research, heretofore, has not always been effective in generating additional competition for Government requirements. The research, to be effective, must precede the development of the Invitation for Bid (IFB) and should identify alternative methods of resolving problems to be encountered by present suppliers, including those who do not market their products to the general public. Again, the entire thrust of the commercial products policy is to generate additional competition, and you may be assured that all responsible suppliers meeting the terms and conditions of Federal IFB's will continue to be able to bid. We firmly believe that when properly applied, the commercial products policy will help small businesses rather than harm them. There are many small businesses who presently do not sell to the Government, but who will be able to do so if we acquire standard commercial products which they now market to the general public.

Your concerns and interest in writing to me regarding the UFPS proposal are appreciated. We intend to meet with the Small Business Administration and other appropriate agencies in implementing the proposal, and we will identify any adverse impact the proposal may have on small businesses. In this regard, every effort will be made to eliminate any aspect of the policy that is considered detrimental to the majority of the businesses.

Please let me know if I can be of further help or assistance to you.

Sincerely,

EDWIN L. HARPER,
Assistant to the President for Policy Development.

APRIL 27, 1982.

Re Final Proposal for Uniform Federal Procurement System (February 26, 1982).

Hon. EDWIN L. HARPER,
Assistant to the President for Policy Development,
The White House, Washington, D.C.

DEAR MR. HARPER: I write this letter not only as counsel for a highly reputable contract supplier of metal office furniture to the federal government through the GSA, but also as a long-time Republican and a strong supporter of the Reagan Administration. With regard to the captioned matter, I cannot for the life of me even begin to understand how such a proposal has been signed off at O.M.B. and how such a proposal could now be presented to the Congress by the Administration. The proposal as written contemplates the exclusion of contract manufacturers from eligibility to compete for federal government business. The final proposal establishes a specific statutory preference in favor of the use of "commercial products" to meet the government's needs. This definition excludes, by adverse preference, contract manufacturers who do not happen to sell to the public on a regular basis. A statutory preference for a commercial product is another method of expressing a statutory preference for the products of big business as distinguished from the products produced by small business. It is my considered judgment that once the members of

Congress realize the full import of these proposals, the entire proposal is going to be branded as a Reagan Administration give away to big business interests. Worse than this, historically the large manufacturers of metal office furniture have never been able to compete successfully with smaller contract manufacturers for the simple reason that their prices were entirely too high.

In past months, both Mr. Stanley H. Hackett of our firm and I have discussed our concern with various people at O.M.B., at GSA and in addition we have talked to a number of the members of Congress on appropriate committees dealing with federal procurement. More specifically, we have discussed our concern both with Mr. Donald Sowle and with Mr. Gerald Carmen. We left these meetings with the express understanding that any new Uniform Federal Procurement System would allow competitive bidding and would allow legitimate small contract suppliers to continue to have the opportunity to compete on GSA purchases in the future. The final proposal mentioned above does not give any such assurance but, quite to the contrary, seems to eliminate all small contract suppliers not in the commercial market from ever again bidding to the federal government.

An example will focus our question more clearly, to-wit: Assume two reputable manufacturers of metal office file cabinets. One traditionally has sold to the public and has maintained no sales to the government on a regular basis. The other traditionally has sold to the government on a bid basis and has maintained no sales to the public on a regular basis. Both manufacture cabinets of comparable quality. Assume further that a government agency determines to purchase 5,000 metal office file cabinets. It publishes a "functional specification", as defined in proposed 41 U.S.C. Section 252 (c), setting forth a statement of the qualitative nature of the property required, as well as certain minimum essential characteristics and standards to which the cabinets must conform. The cabinets of either manufacturer will meet the standards of the "functional specification". Will the contract manufacturer be permitted to bid on this contract, or will he be precluded because he does not regularly sell his cabinets to the public on a commercial basis?

Every time we think we have this matter clarified by officials of the Administration, we later read language in documents, such as the most recently proposed Uniform Federal Procurement System, which to our mind clearly cuts out the contract manufacturer. The above proposed question concerning the contract manufacturer becomes even more interesting and critical if you assume that the price at which the contract manufacturer could furnish the product to the federal government is $100 and the price at which the commercial manufacturer could furnish the product to the government is $200.

Quite frankly, sir, we are at a complete loss to understand how the Reagan Administration could lend its name to a proposal of this type, which I assure you will dramatically increase the price of purchases of items such as metal furniture to the government, and concurrently will eliminate from fair competition legitimate, small contract suppliers like our client. How could this have happened? As good Republicans and believing in the complete integrity of the Reagan Administration, we are forced to believe that someone, somewhere, though well intentioned, has been sold a bill of goods by big business interests attempting to squeeze small contract manufacturers out of the government purchasing market. We have done our utmost to persuade appropriate officialdom of the direction these proposals are heading—apparently, so far, without success. None of the people in our position, to my knowledge, have yet gone to the opposition party or the newspapers and screamed "big business", but unless we can reach someone who understands the problem and will set it in the right direction, we obviously have no other alternative.

Please, let us know if we can be of further service to explain the problem to appropriate officials.

Sincerely,

LEE H. HENKEL, Jr.

Senator PRYOR. The hearing will now recess.

[Whereupon, at 12:45 p.m., the committee recessed, to reconvene at the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

97TH CONGRESS
2D SESSION

S. 2127

To revise the procedures for soliciting and evaluating bids for Government contracts and awarding such contracts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 23 (legislative day, FEBRUARY 22), 1982

Mr. COHEN (for himself, Mr. ROTH, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To revise the procedures for soliciting and evaluating bids for Government contracts and awarding such contracts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Contracting Act of 1982".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"SEC. 303. (a) Except as provided in subsection (b), executive agencies shall use competitive procedures in making purchases and contracts for property and services. In using competitive procedures, executive agencies shall solicit bids without bias or favoritism with respect to any prospective source and in a sufficient number to ensure that effective and efficient competition for the purchase or contract is achieved.

"(b) An executive agency may use noncompetitive procedures in making purchases and contracts for property and services only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source in order to maintain an essential in-

dustrial capability in the United States or to achieve national industrial mobilization;

"(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute requires that the procurement be made through another executive agency or a specified source; or

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.";

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency makes a purchase or enters into a contract after providing the solicitation documents to more than one source.

"(d) The term 'noncompetitive procedures' means procedures under which an executive agency makes a purchase or enters into a contract after providing the solicitation documents to only one source.

"(e) The term 'source' means any individual, firm, unincorporated association, joint venture, partnership, corporation, or any affiliate thereof, which submits, intends to submit, or is selected by an executive agency to submit a bid for a contract.

"(f) The term 'contract' means a written agreement for the procurement of goods or services, including amendments and modifications to any such agreement, entered into by an executive agency and a source which has submitted a bid."; and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"SEC. 311. (a) Each solicitation for bids under this title shall include—

"(1) a description of—

"(A) all factors, including price, which the executive agency reasonably expects to consider in evaluating bids submitted in response to the solicitation; and

"(B) the relative importance which the executive agency assigns to such factors;

"(2) to the maximum extent possible, consistent with the needs of the executive agency, such description of the executive agency's objectives in procuring the property and services, or of the intended functions of the property or services, as will promote the submission of bids to furnish any of a variety of types or designs of property or services which achieve such objectives or perform such functions;

"(3) a statement that—

"(A) bids will be evaluated with discussions under section 312(c);

"(B) bids are intended to be evaluated with discussions under section 312(c), but might be evaluated without discussions under section 312(b); or

"(C) bids will be evaluated without discussions under section 312(b); and

"(4) in the case of a solicitation including a statement described in clause (3)(C), a statement specifying the time and location for the opening of bids.

"(b) Bids submitted in response to a solicitation including a statement described in subsection (a)(3)(C) shall be opened publicly at the time and place specified in the solicita-

tion. Such bids may not be withdrawn or modified after the opening unless a mistake in the bid is established to the satisfaction of the executive agency which issued the solicitation.

"(c) Any bid submitted in response to a solicitation including a statement described in subsection (a)(3)(B) may be accepted without discussions under section 312(b).

"EVALUATION OF BIDS; AWARD

"SEC. 312. (a)(1) An executive agency issuing a solicitation shall evaluate each bid submitted in response to such solicitation based on—

"(A) the bid price; and

"(B) such other factors as the executive agency considers appropriate.

"(2) Factors which an executive agency may consider under paragraph (1)(B) include—

"(A) the total cost to the Government, including—

"(i) bid price; and

"(ii) maintenance and operating costs during the useful life of the property in the case of purchased property, or during the contract term in the case of services and leased property;

"(B) the cost of administering the contract;

"(C) technical factors; and

"(D) management factors.

"(b) Except as provided in subsection (c), the executive agency shall evaluate bids without discussions with the bidders in any case in which the Government's needs, with respect to the property or services to be procured, and the terms and conditions of the contract are sufficiently described to permit—

"(1) sources timely to prepare and submit bids on an informed basis; and

"(2) the executive agency timely to evaluate all bids on a common basis.

"(c) An executive agency may discuss bids with bidders during the evaluation of bids whenever the executive agency determines that it is necessary to discuss the Government's needs or the terms and conditions of the contract with bidders after receipt of bids and before the purchase or the award of the contract.

"(d) Subject to the requirements of subsections (b) and (c), the evaluation methods described in such subsections may be used successively in any procurement in which bids are intended to be evaluated in successive steps.

"(e) All bids may be rejected when it is determined to be in the Government's best interest.

"(f) An executive agency may not, after using noncompetitive procedures, purchase or enter into a contract for property or services at a price exceeding $75,000 unless—

"(1) a notice has been published pursuant to section 313(b)(2);

"(2) all interested persons have been permitted to respond or submit bids in response to such notice within thirty days after the date of the publication of such notice;

"(3) the head of the executive agency has considered all responses submitted within thirty days after such date; and

"(4) the head of the executive agency has approved the purchase or the award of the contract.

"(g) Award shall be made by giving notice of the award to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the Government on the basis of price and such other factors as the executive agency considers appropriate. Notification of such award shall be promptly made to all other bidders.

"PROCUREMENT NOTICE

"SEC. 313. (a) Except as provided in subsection (c)—

"(1) any agency intending to purchase or enter into a contract for property or services shall cause to be published by the Secretary of Commerce a notice described in subsection (b) in any case in which—

"(A) the executive agency intends to use competitive procedures and expects the price of the property or services to exceed $25,000; or

"(B) the executive agency intends to use noncompetitive procedures and expects the price of the property or services to exceed $75,000; and

"(2) any executive agency purchasing or awarding a contract for property or services at a price exceeding an amount specified by the Administrator of Federal Procurement Policy shall cause to be published by the Secretary of Commerce a notice announcing such purchase or award.

"(b)(1) Each notice required by subsection (a)(1)(A) shall—

"(A) be published as early as practicable in the procurement process; and

"(B) include a description of the property or services to be purchased or contracted for.

"(2) Each notice required by subsection (a)(1)(B) shall—

"(A) be published as early as practicable in the procurement process, but not less than thirty days before the date on which the executive agency intends to make a purchase from or award a contract to any source; and

"(B) include—

"(i) the names of the sources to be solicited;

"(ii) a description of the property or services to be purchased or contracted for;

"(iii) the estimated dollar value of the purchase or contract;

"(iv) the identity and location of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation; and

"(v) a statement that any person may respond to the notice and submit bids within thirty days after the date the notice is published.

"(3) Each notice required by subsection (a)(2) shall be published promptly after the time of the purchase or the award of the contract.

"(c) The requirements of subsection (a) shall not apply to—

"(1) any classified procurement with respect to which a notice under such subsection cannot be written in a manner which avoids the disclosure of classified information;

"(2) any procurement under conditions described in clauses (2), (3), (4), or (5) of section 303(b); and

"(3) any procurement in which only foreign sources are to be solicited.

"RECORD REQUIREMENTS

"SEC. 314. (a) Each executive agency shall establish and maintain a record, by fiscal year, of the procurements in which noncompetitive procedures were used during such fiscal year.

"(b) The record established under subsection (a) shall include with respect to each procurement—

"(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the justification under section 303(b) for the use of noncompetitive procedures; and

"(5) the name of the officer or employee of the executive agency who approved the use of noncompetitive procedures in such procurement.

"(c) The record established under subsection (a) shall be available to any Member of Congress.".

(b) The table of contents of such Act is amended—

(1) by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.";

and

(2) by inserting after the item relating to section 310 the following new items:

"Sec. 311. Solicitation requirements.
"Sec. 312. Evaluation of bids; awards.
"Sec. 313. Procurement notice.
"Sec. 314. Record requirements.".

CONFORMING AMENDMENTS

SEC. 102. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c) and (d) and inserting in lieu thereof:

"(c) If in the opinion of the agency head bids received under competitive procedures evidence any violation of the antitrust laws, he shall refer such bids to the Attorney General for appropriate action."; and

(C) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively;

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"CONTRACT REQUIREMENTS";

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded under this title";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using noncompetitive procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using noncompetitive procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11)–(13), or (14) of section 302(c)," in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using noncompetitive procedures"; and

(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303." in section 310 and inserting in lieu thereof "the provisions of this title relating to noncompetitive procedures.".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements.".

TITLE II—AMENDMENTS TO TITLE 10, UNITED STATES CODE

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 201. (a) Chapter 137 of title 10, United States Code, is amended—

(1) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:

"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.

"(3) 'Competitive procedures' means procedures under which the head of an agency makes a purchase or enters into a contract after providing the solicitation documents to more than one source.

"(4) 'Noncompetitive procedures' means procedures under which the head of an agency makes a purchase or enters into a contract after providing the solicitation documents to only one source.

"(5) 'Source' means any individual, firm, unincorporated association, joint venture, partnership, corporation, or any affiliate thereof, which submits, intends to submit, or is selected by the head of an agency to submit a bid for a contract.

"(6) 'Contract' means a written agreement for the procurement of goods or services, including amendments and modifications to any such agreement, entered into by the head of an agency and a source which has submitted a bid.";

(2) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:

"§ 2304. Competition requirements

"(a) Except as provided in subsection (b), the head of an agency shall use competitive procedures in making purchases and contracts for property and services. In using competitive procedures, the head of an agency shall solicit bids without bias or favoritism with respect to any prospective source and in a sufficient number to ensure that effective and efficient competition for the purchase or contract is achieved.

"(b) The head of an agency may use noncompetitive procedures in making purchases and contracts for property and services only when—

"(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

"(3) it is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

"(4) the terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

"(5) a statute requires that the procurement be made through another agency or a specified source; or

"(6) the disclosure of the agency's needs to more than one source would compromise the national security.

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1) Each solicitation for bids under this title shall include—

"(A) a description of—

"(i) all factors, including price, which the head of an agency reasonably expects to consider in evaluating bids submitted in response to the solicitation; and

"(ii) the relative importance which the agency assigns to such factors;

"(B) to the maximum extent possible, consistent with the needs of the agency, such description of the agency's objectives in procuring the property and services, or of the intended functions of the property or services, as will promote the submission of bids to furnish any of a variety of types or designs of property or services which achieve such objectives or perform such functions;

"(C) a statement that—

"(i) bids will be evaluated with discussions under subsection (b)(3) of this section;

"(ii) bids are intended to be evaluated with discussions under subsection (b)(3) of this section, but might be evaluated without discussions under subsection (b)(2) of this section; or

"(iii) bids will be evaluated without discussions under subsection (b)(2) of this section; and

"(D) in the case of a solicitation including a statement described in clause (C)(iii) of this paragraph, a statement specifying the time and location for the opening of bids.

"(2) Bids submitted in response to a solicitation including a statement described in paragraph (1)(C)(iii) of this subsection shall be opened publicly at the time and place specified in the solicitation. Such bids may not be withdrawn or modified after the opening unless a mistake in the bid is established to the satisfaction of the head of an agency which issued the solicitation.

"(3) Any bid submitted in response to a solicitation including a statement described in paragraph (1)(C)(ii) of this subsection may be accepted without discussions under subsection (b)(2) of this section.

"(b)(1)(A) The head of an agency issuing a solicitation shall evaluate each bid submitted in response to such solicitation based on—

"(i) the bid price; and

"(ii) such other factors as such head of an agency considers appropriate.

"(B) Factors which the head of an agency may consider under paragraph (1)(A)(ii) of this subsection include—

"(i) the total cost to the Government, including bid price and maintenance and operating costs during the useful life of the property (in the case of purchased property) or during the contract term (in the case of services and leased property);

"(ii) the cost of administering the contract;

"(iii) technical factors; and

"(iv) management factors.

"(2) Except as provided in paragraph (3) of this subsection, the head of an agency shall evaluate bids without discussions with the bidders in any case in which the Government's needs, with respect to the property or services to be procured, and the terms and conditions of the contract are sufficiently described to permit—

"(A) sources timely to prepare and submit bids on an informed basis; and

"(B) the head of an agency timely to evaluate all bids on a common basis.

"(3) The head of an agency may discuss bids with bidders during the evaluation of bids whenever such head of an agency determines that it is necessary to discuss the

Government's needs or the terms and conditions of the contract with bidders after receipt of bids and before the purchase or the award of the contract.

"(4) Subject to the requirements of paragraphs (2) and (3) of this subsection, the evaluation methods described in such paragraphs of this subsection may be used successively in any procurement in which bids are intended to be evaluated in successive steps.

"(5) All bids may be rejected when it is determined to be in the Government's best interest.

"(6) The head of an agency may not, after using noncompetitive procedures, purchase or enter into a contract for property or services at a price exceeding $75,000 unless—

"(A) a notice has been published pursuant to subsection (c)(2)(B) of this section;

"(B) all interested persons have been permitted to respond or submit bids in response to such notice within thirty days after the date of the publication of such notice;

"(C) the head of an agency has considered all responses submitted within thirty days after such date; and

"(D) the head of an agency has approved the purchase or the award of the contract.

"(7) Award shall be made by giving notice of the award to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the Government on the basis of price and such other factors as the agency considers appropriate. Notification of such award shall be promptly made to all other bidders.

"(c)(1) Except as provided in paragraph (3) of this subsection—

"(A) any head of an agency intending to purchase or enter into a contract for property or services shall cause to be published by the Secretary of Commerce a notice described in paragraph (2) in any case in which—

"(i) such head of an agency intends to use competitive procedures and expects the price of the property or services to exceed $25,000; or

"(ii) such head of an agency intends to use noncompetitive procedures and expects the price of the property to exceed $75,000; and

"(B) any head of an agency purchasing or awarding a contract for property or services at a price exceeding an amount specified by the Administrator of Federal Procurement Policy shall cause to be published by the Secretary of Commerce a notice announcing such purchase or award.

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"(2)(A) Each notice required by paragraph (1)(A)(i) of this subsection shall—

"(i) be published as early as practicable in the procurement process; and

"(ii) include a description of the property or services to be purchased or contracted for.

"(B) Each notice required by paragraph (1)(A)(ii) of this subsection shall—

"(i) be published as early as practicable in the procurement process, but not less than thirty days before the date on which such head of an agency intends to issue the solicitation to any source; and

"(ii) include the names of the sources to be solicited, a description of the property or services to be purchased or contracted for, the estimated dollar value of the purchase or contract, the identity and location of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation, and a statement that any person may respond to the notice and submits bids within thirty days after the date the notice is published.

"(C) Each notice required by paragraph (1)(B) of this subsection shall be published promptly after the time of the purchase or the award of the contract.

"(3) The requirements of paragraph (1) of this subsection shall not apply to—

"(A) any classified procurement with respect to which a notice under such paragraph cannot be written in a manner which avoids the disclosure of classified information;

"(B) any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(b); and

"(C) any procurement in which only foreign sources are to be solicited.

"(d) If the head of an agency considers that any bid received under the provisions of this chapter evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action."; and

(3) by adding at the end thereof the following new section:

"§2316. Record requirements

"(a) Each head of an agency shall establish and maintain a record, by fiscal year, of the procurements in which noncompetitive procedures were used during such fiscal year.

"(b) The record established under subsection (a) of this section shall include with respect to each procurement—

"(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the justification under section 2304(b) of this title for the use of noncompetitive procedures; and

"(5) the name of the officer or employee of the agency who approved the use of noncompetitive procedures in such procurement.

"(c) The record established under subsection (a) of this section shall be available to any Member of Congress.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.
"2305. Solicitation, evaluation, and award procedures; notice requirements.";

and

(2) by adding at the end thereof the following new item:

"2316. Record and reporting requirements.".

CONFORMING AMENDMENTS

SEC. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sen-

tence of subsection (a) and inserting in lieu thereof "may";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "entered into using non-competitive procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter"; and

(D) by adding at the end thereof the following new subsection:

"(h) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.";

(2) by striking out subsection (b) in section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is

likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.";

(3) in section 2311—

(A) by striking out "(1) under clauses (11)–(16) of section 2304(a) of this title, and (2)" in the first sentence; and

(B) by striking out the second sentence; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "entered into using noncompetitive procedures".

TITLE III—APPLICABILITY

SEC. 301. The amendments made by this Act shall apply with respect to purchases made and contracts entered into on or after the date sixty days after the date of the enactment of this Act.

FACT SHEET

The Competition in Contracting Act of 1982

I. Competitive Procedures

A. Present Law

The basic policy set forth in the Armed Services Procurement Act (10 U.S.C. §2301) and the Federal Property and Administrative Services Act (41 U.S.C. §251) is that contracts for services and property for the military departments and civilian agencies will be subject to competition when practicable.

Under the present law, federal procurements are accomplished by either of two methods: formal advertisement or negotiation. While formal advertising is required whenever feasible, the statutes establish exceptions to its use which provide contracting officers the authority to negotiate. It is important to note that formal advertising is always competitive, whereas negotiated awards may be either competitive or noncompetitive.

B. Legislative Proposal

The Competition in Contracting Act of 1982 distinguishes between competitive and noncompetitive procedures in lieu of formal advertising and negotiation. In this manner, competitive negotiation is put on par with formal advertising -- competitive procedures -- and exceptions are provided to justify noncompetitive procedures.

Within competitive procedures, the executive agencies would be permitted to invite sealed bids (formal advertising) or request competitive proposals (competitive negotiation), whichever is most conducive to the conditions of the contract. The bill incorporates the procedures for evaluating and awarding sealed bids and competitive proposals from the present procurement statutes. The bill also applies the truth-in-negotiation provision of the Armed Services Procurement statute, which requires contractors to submit cost or pricing data and certify that the data are accurate, complete, and current (15 U.S.C. §2306(f)), to civilian procurements.

A specification section has been added which establishes standards for drafting unrestrictive specifications and permits agencies to state specifications in terms of function, performance, or detailed design.

II. Noncompetitive Procedures

A. Present Law

To control the use of negotiation, Congress has required that its use be justified under one of the 17 exceptions for the Department of Defense, NASA, and the Coast Guard (10 U.S.C. §2304(a)),

or 15 exceptions for the civilian agencies (41 U.S.C.§252(c)). Many of these exceptions, however, not only authorize the use of negotiation but also permit the use of noncompetitive procedures.

B. Legislative Proposal

This legislation shifts the emphasis from having to justify negotiation to having to justify noncompetitive procurements. An Executive agency may use noncompetitive procedures in making purchases and contracts for property and services only when:

1. The property and services needed by the government are available only from a single source and no other type of property or service will satisfy the needs of the Executive agency.

This exception is a much more restrictive version of the "competition-is-impracticable" exception (10 U.S.C.§2304(a)(10); 41 U.S.C.§252 (c)(10)). The "impracticable" exception has many sub-exceptions, provided in the Defense Acquisition Regulations (DARs) and the Federal Procurement Regulations (FPRs) which make it particularly easy to invoke. Our exception is more stringent as it permits sole-source procurement when it is truly warranted, i.e., when only a single source is available.

2. The Executive agency's need for the property or service is of such urgency that the government would be seriously injured by the delay involved in using competitive procedures.

This exception is a strengthened version of the "public exigency" exception (10 U.S.C.§2304(a)(2); (41 U.S.C.§252(c)(2)). Unlike the present law, this exception recognizes the different degrees of urgency: some situations require immediate action, while others need attention, but not necessarily immediate. Therefore, competition to the maximum extent possible should be obtained.

3. It is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization.

This exception is adopted from the Armed Services Procurement Act (10 U.S.C.§2304(a)(16)), although its focus has been narrowed to justify only noncompetitive procurements. It is an approach advocated by defense experts to address the problem of the deteriorating U.S. defense industrial base.

4. The terms of any agreement with a foreign government, or the directions of any foreign government reimbursing the Executive agency for the cost of the procurement of property or services being procured for such government, have the effect of requiring the use of noncompetitive procedures.

This exception deals with two separate situations. The first situation in which noncompetitive procurements are justified is when an international agreement is made, e.g., between two NATO countries, to purchase a particular weapons system from one source. The second situation involves U.S. procurement of goods and services to be sold to another country. In this case, the foreign government chooses the contractor.

5. The statute requires that the procurement is made through another Executive agency or a specified source.

This exception groups together all the provisions of the U.S. Code which require procurement through a specified Executive agency (i.e., Small Business Administration under section 8(a) of the Small Business Act (15 U.S.C. §637(a)) or through a specified source (e.g., the Blind-made Products program, under 41 U.S.C. §48).

6. Disclosure of the Executive agency's needs to more than one source would jeopardize the national security.

This exception pertains to classified procurements when disclosure of an agency's needs to more than one source, even though many sources may have security clearances, would jeopardize national security.

III. Procurement Notice

A. Present Law

In order to increase the opportunity for competition, it is required in the Small Business Act that advance notice of procurement actions be publicized by inserting a synopsis of the procurement in the Commerce Business Daily (CBD) (15 U.S.C. §637(e)). All defense procurements of $10,000 and above, and all civilian procurements of $5,000 and above are subject to this requirement unless they fall within one of the exceptions set forth in the statute.

The regulations require that Executive agencies publicize in the CBD for a period of 10 days before the issuance of solicitations (DAR 1-1003.1; FPR 1-1.1003.1). This provides potential competitors which are not on current bidders' lists ample time to prepare bids.

B. Legislative Proposal

The procurement notice provision in this legislation codifies the regulatory requirement that agencies publicize competitive and noncompetitive procurements in the CBD for a specific time period, but extends this period to 30 days to ensure that potential competitors have sufficient time to respond. The bill requires the Office of Federal Procurement Policy to establish a dollar threshold, not to exceed $25,000, over which an agency must publicize its prospective contracts. This notice would serve as a "double check" on the marketplace.

This legislation also provides exceptions to the procurement notice requirement. Included in this list are exceptions two through six which permit noncompetitive procedures. The first exception is not included since the procurement notice is needed to flush out the marketplace to find potential competitors.

IV. Record Requirement

A. Present Law

The Office of Federal Procurement Policy Act requires the Administrator for OFPP to establish the Federal Procurement Data System (FPDS), a computer-based information system for collecting, developing, and disseminating procurement data (41 U.S.C. §405(d)(5)). The OFPP Act does not, however, require individual agencies to maintain detailed data on noncompetitive contracts.

B. Legislative Proposal

The Competition in Contracting Act requires Executive agencies to establish and maintain an identifiable file or list of all noncompetitive procurements, by fiscal year, which designates the contractor, the articles obtained, the dollar value, the reason for using noncompetitive procedures (pursuant to one of the six exceptions), and the position of the contracting officer for each procurement. The bill requires that this information be transmitted to the FPDS.

CORRESPONDENCE SUBMITTED BY MR. POLITES

Constantine N. Polites
[illegible]
[illegible]

June 4, 1982

Mr. John Layman
Secretary of the Navy
Washington, D.C. 20350

Re: 2U-001020

Dear Mr. Layman:

Reference is made to my letters dated January 12, April 20,1982 and your letters signed by Mr. Pyatt dated Mar 2 and Apr 30, 1982.

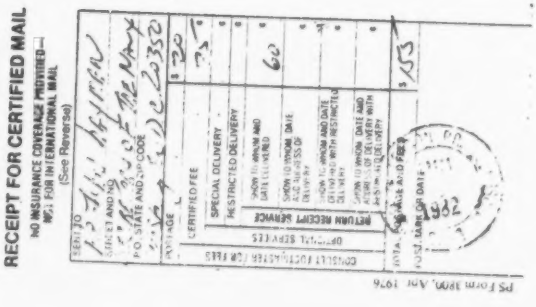
At issue is competition in government procurements, not the legality of a specification which we all acknowledge.

In telephone conversations with your staff members, I have been advised that the Navy's position regarding competition is stated in the above responses. Since the subject of competition is clearly avoided in those letters, I believe that this is a subject which you do not wish to discuss.

At the moment,the Navy appears to desire competition, if available, only after a solicitation is produced. My suggestion, which you obviously reject, is to provide for competition in the purchase documents,specification and solicitation. In doing so you will provide for lower costs to the government.

Sincerely,

Constantine N. Polites



DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON D C 20350

APR 30

Mr. Constantine N. Polites & Co.
833 Guenther Avenue
Yeadon, Pennsylvania 19050

Dear Mr. Polites:

This responds to your letter of April 20, 1982, to Secretary of the Navy Lehman.

Your previous letters to the Navy and protests to the General Accounting Office (GAO) have resulted in thorough reviews of your contention that specifications for tube and clamp scaffolding used in naval shipyards are unduly restrictive and that your product can satisfy the Navy's requirement at a lower cost. The Navy position was sustained by the Comptroller General in decision B-198089 of June 23, 1981 which was considered by GAO to be dispositive of the issues which you have raised on a number of separate occasions.

Considerable time and effort has been expended by the government to date to investigate and address your issues. Although your tenacity is admirable, further discussion of these same issues, whether by correspondence or in person is considered unnecessary and counter-productive unless you have new information to offer.

Sincerely,

Everett Pyatt

EVERETT PYATT
PRINCIPAL DEPUTY
ASSISTANT SECRETARY OF THE NAVY
(SHIPBUILDING AND LOGISTICS)

April 20, 1982

Mr. John Layman
Secretary of the Navy
Washington, D.C. 20350

Re; 2U- 001020'

Dear Mr. Layman:

I am in receipt of Mr. Pyatt's letter dated Mar 2, 1982 and regret that it in no way responded to the comments in my letter dated January 18, 1982.

Since the subject of couplers and specifications has been discussed at various levels of Naval administration since 1974, I feel that it would be appropriate to meet with oyou personally regarding this subject. I kindly request such an opportunity at your earliest convenience.

Sincerely,

Constantine N. Polites

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON D C 20350

MAR 2 1982

Mr. Constantine N. Polites & Co.
833 Guenther Avenue
Yeadon, Pennsylvania 19050

Dear Mr. Polites:

This is in response to your letter of January 20, 1982 in which you express concern over specifications for tube and clamp scaffolding.

I believe that the Decision of the Comptroller General, B-198089, which you attached to your letter, fully addresses the specifics of your concerns.

I appreciate your bringing this issue to my attention and regret that a more favorable response to your letter is not possible.

Sincerely,

Everett Pyatt

EVERETT PYATT
PRINCIPAL DEPUTY
ASSISTANT SECRETARY OF THE NAVY
(SHIPBUILDING AND LOGISTICS)

JAN 13 - 1982

Mr. John Layman
Secretary of the Navy
Department of the Navy
Washington, D.C. 20350

Re: Naval Procurement

Dear Mr. Layman:

Recently, I read Mr. Buckley's column in the International Herald Tribune regarding the " Corpus Christi" baptism, with total amusement. It is in this spirit that I am addressing this subject to you. All other attempts have failed.

Presently, a specification can be written which is not arbitrary or restrictive in the legal sense, yet which provides for access of only one commercially available, off the shelf, product. Such is the case with Mil S 29180 (NAVSEA) (Tube & Clamp Scaffolding).

Attached is a photocopy of a recent award made to our competitor. Our offer was $ 6,000 lower, for a product which is used by the nuclear industry and supports twice the load of the product purchased. Our product, however, does not meet the requirements of NAVSEA.

I feel that purchase descriptions, specifications and other procurement documents should contain language which would permit at least two commercially available products to comply. The burden should be on the producer of the specification to seek out at least two products and accordingly modify the specification to permit access for those two products, as a minimum.

Should this subject be of interest to you, I would be pleased to provide you with additional information for your consideration.

Sincerely,

Constantine N. Polites

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-198089 DATE: June 23, 1981

MATTER OF: Constantine N. Polites & Co.

DIGEST:

1. Where procuring activity has established prima facie support for reasonableness of allegedly restrictive specifications and protester has failed to demonstrate that specifications are clearly unreasonable, specifications are not unduly restrictive of competition.

2. GAO will not question agency determination that a less restrictive description of the Government's requirements will meet its needs.

Constantine N. Polites & Co. (Polites) protests the inclusion of various specifications in request for proposals (RFP) N00406-80-R-0576 issued by the Naval Supply Center, Bremerton, Washington (Navy) for scaffolding components. In particular, Polites contends that certain specifications concerning the couplers which connect scaffolding pipes are unduly restrictive. We deny the protest.

We have on numerous occasions considered Navy requirements for scaffolding materials and have encouraged the Navy to develop a standard military specification for these items. See Constantine N. Polites & Co., B-187721, June 7, 1977, 77-1 CPD 401; Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437. During Navy's development and review of its military specification for scaffolding, Polites protested that certain contemplated specifications were unreasonable and unduly restrictive. We dismissed that protest as premature because the military specifications had not yet been finalized and had not been directed toward a specific procurement. Constantine N. Polites & Co., B-189214, October 18, 1979, 79-2 CPD 267.

Military Specification Mil-S-29180 has now been finalized and, subject to three material exceptions, incorporated by reference in the RFP which Polites now finds objectionable. Polites' current protest incorporates the allegations of undue restrictiveness contained in the protest we dismissed as premature. Those allegations are concerned with the following requirements: type of bolt, steel grade of bolts, upsetting of bolts, hot-dipped galvanization of coupler parts, 10° rotation limitation, and failure to specify size and weight of couplers. Additionally, Polites questions the propriety of the three material exceptions to the military specification which are enumerated in the RFP. These additional specifications require that couplers be right-handed, have four inch centers and have a 2000 pound minimum frictional holding capacity.

Generally, when a protester challenges specifications as unduly restrictive of competition, the procuring agency must establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. The burden of proof, however, remains on the protester to show that the requirements complained of are clearly unreasonable. Constantine N. Polites & Co., B-189214, December 27, 1978, supra. This is so because the Government's contracting agencies are primarily responsible for determining the needs of the Government and the methods of accommodating such needs. 38 Comp. Gen. 190 (1958); Manufacturing Data Systems, Incorporated, B-180608, June 28, 1974, 74-1 CPD 348. Government procurement officials, who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they will be used in the future, generally are in the best position to know the Government's actual needs, and therefore are best able to draft appropriate specifications. Particle Data, Inc.; Coulter Electronics, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257. With these principles in mind, we will examine the specific allegations.

CAPTIVE BOLTS

In Constantine N. Polites & Co., B-189214, supra, we questioned an RFP restriction which designated eye-bolt design to the exclusion of a T-bolt design even if the T-bolt exhibited the swinging motion found desirable in the eye-bolt design. The military specification now requires captive bolts which are capable of movement only in a radial plane. Navy has limited

the movement of the bolt to prevent improper seating of the bolt during tightening.

Polites apparently contends that requiring a captive rather than T-bolt design is arbitrary and unduly restictive. We do not agree. The term "captive bolt" includes both eye-bolts and T-bolts. Thus, T-bolt designs which exhibit the characteristic of movement in a single radial plane would meet the specification. Navy contends, and Polites does not dispute, that achieving this characteristic with the T-bolt design is not a difficult manufacturing process. We believe the Navy has overcome our original objections and, therefore, we conclude that this requirement is not unduly restrictive.

BOLT STEEL QUALITY

Polites also questions the requirement that bolts be constructed of medium carbon steel and possess a tensile strength of 120,000 pounds per square inch. Navy reports that the required bolts are readily available and are normally used in situations which require high strength. Navy views the tensile strength requirement as necessary to insure reliability of coupler components.

Polites responds that the low carbon steel bolts of lower tensile strength which it uses in its couplers have not been found to be unsafe. We do not find, however, that the mere assertion that bolts of lesser tensile strength may be adequate to meet the agency's minimum needs is sufficient to sustain Polites' burden to demonstrate that the requirement is clearly unreasonable. We find no merit to this assertion.

UPSETTING OF BOLTS

Polites also believes that the requirement that bolts be upset, a process which discourages the inadvertent removal of nuts, is unreasonable. We disagree. The purpose of this requirement is to preclude the loss of bolts during disassembly and the threading of metric nuts on United States threads (or vice versa) which prevents proper tightening.

Polites contends that the threading of a United States nut on a metric bolt is impossible, and the threading of a metric nut on a United States bolt produces a connection which is so

loose that the error is immediately obvious to the assembler. Polites also asserts that the process of upsetting, although easy and inexpensive if it is already part of the contractor's process, is inordinately expensive to those suppliers who do not usually upset bolts.

We find these arguments unpersuasive. Since the only evidence in the record concerning the possibility of mixing threads is the conflicting statements of the agency and the protester, we must accept the view of the agency on this matter. Achievement Products, Inc., B-192621, January 22, 1979, 79-1 CPD 36. Even assuming that protester's assertion concerning the incompatibility of threads is accurate, we believe the upsetting requirement is justifiable merely to prevent the expense and inconvenience of replacing lost bolts. We also note that the specifications require a cap opening which permits assembly and disassembly without removal of the nut. The obvious purpose of this requirement is to reduce labor costs in assembly and disassembly. To the extent that upsetting facilitates this labor-saving method, the reasonableness of this requirement is further established. In view of the legitimate need for upsetting, the fact that upsetting may be more expensive for certain suppliers than others is without legal significance. The Government is not obliged to equalize the competitive positions of all potential bidders. Tenavision, Inc., B-199485, July 28, 1980, 80-2 CPD 76.

HOT-DIPPED GALVANIZATION OK ND

The military specification requires that all parts of the coupler be hot-dipped galvanized. Polites concedes that hot dipped galvanization provides more protection than electro-galvanization, the process it favors, but contends that damage to the coupler usually occurs through abuse rather than corrosion. Polites alleges that the electro-galvanized components it has supplied to the Government in the past have not precipitated any written complaint. Thus, Polites believes that the hot-dipped galvanization requirement is unreasonable. Its objection to the hot-dipped galvanizing process, however, is based primarily on the limitations of its own manufacturing abilities as dictated by the design of its components.

The Navy has found from field usage that components with other than hot-dipped galvanized finishes corrode and deteriorate rapidly in the marine environment. Polites has not offered any positive evidence to the contrary. The absence of written complaints in general is not sufficient to establish that the finish Polites uses on its materials is adequate to meet the

specific needs of the agency. Thus, because Navy is in the best position to assess the prior performance of various finishes and determine its minimum needs, we find this specification to be reasonable. Constantine N. Polites & Co., B-193730, September 10, 1979, 79-2 CPD 183.

10° ROTATION TEST

The military specifications require that randomly sampled components meet a number of stress tests. Polites objects to the requirement that right angle and swivel couplers deflect fewer than 10° from horizontal when subjected to test weight loads. Polites apparently designs its couplers to rotate more than 10° on the theory that greater rotation reduces slippage along the vertical pipe or tube. Navy has limited rotation to 10°, however, to insure that the coupler transmits the load parallel to the vertical tube rather than perpendicular to it. Perpendicular transmission of load creates a risk that the pipe will collapse and induce the failure of the entire scaffolding structure, according to the agency. Additionally, the 10° test serves as check on the integrity of the connecting pin (which connects the coupler cap and body) and insures the proper design and construction of the swivel coupler. Polites has offered no evidence to the contrary, and we, therefore, view the 10° rotation test as a reasonable means of insuring the safety of the scaffolding.

LACK OF SIZE AND WEIGHT LIMITATION

Polites also asserts that the military specification is unreasonable and imbalanced in that it does not take size and weight of couplers into consideration. Polites claims this assertion is supported by our holding in Constantine N. Polites, B-189214, December 27, 1978, supra.

That decision is inapposite here. In that decision, our concern about size and weight of couplers was generated by two particular specifications: quality of steel used to construct the coupler and eye-bolt design of the coupler. Navy attempted to justify the steel quality requirement as limiting component size and weight. We rejected this justification, noting that merely specifying composition of the coupler would not determine its size and weight. We suggested that Navy achieve size and weight limitation by actually establishing size and weight parameters in the RFP. Navy attempted to justify its eye-bolt design based upon the relative ease of assembling

eye-bolt couplers. In connection with this specification, we stated that Navy should have considered the extent to which size and weight would affect the ease of assembly.

In the instant solicitation, Navy has specified neither the quality of steel (except for coupler bolts) nor, as mentioned above, eye-bolt design. Hence, our concern about the failure to establish size and weight limitations is diminished. Moreover, Navy reports that it considered establishing such a limitation but concluded that size and weight restrictions were unnecessary because all known commercially available couplers (the specifications provide that all scaffolding components shall be the standard commercial product of the manufacturer) are of sizes and weights which are acceptable to Navy's users. We believe these factors show that it was reasonable for Navy not to specify the maximum size and weight of the coupler. Polites has offered nothing of substance to the contrary.

RIGHT HANDED AND FOUR INCH CENTER REQUIREMENTS

As noted above, the Navy, following a conference with industry representatives, including Polites, designated three specifications in addition to the military specification. These specifications include the requirements that right angle couplers be right-handed (i.e., the coupler must be configured to enable the assembler to manipulate clamping nuts with the right hand while positioning the coupler with the left hand) and that couplers have four inch centers (i.e., the coupler must be so configured that when two couplers are butted against each other, the distance between the centers of the couplers is four inches). Polites contends that these requirements are unduly restrictive in the absence of size and weight requirements in the specifications. We addressed this specific allegation in the context of Constantine N. Polites, B-189214, December 27, 1976, supra., wherein we found that both the righthanded and four inch center requirements were unobjectionable. Polites has presented no new evidence which persuades us to alter our original position.

MINIMUM FRICTIONAL HOLDING CAPACITY

Finally, Polites contends that Navy lowered the minimum frictional holding capacity from the 4000 pounds designated in the military specification, to 2000 pounds in order to

accommodate Patent Scaffolding Company. Polites alleges that Patent Scaffolding Company couplers failed at pressures below 4000 pounds in tests conducted at Norfolk Naval Shipyard.

Navy responds that it reduced the requirement because the 4000 pound requirement tended to disqualify heavy duty couplers which distribute the weight over a broader area than other couplers. Navy reports that no shipyard had ever experienced a problem with heavy duty couplers. Navy further states that industry representatives agreed that the test had little correlation to actual performance.

Assurance that sufficiently vigorous specifications are used is ordinarily of concern primarily to procurement personnel and user activities. It is they who must suffer any difficulties which result from inadequate equipment. Miltope Corporation-Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417. Therefore, we generally will not question an agency determination that a less restrictive description of the Government's requirements will meet its needs. Value Precision, Inc., B-191563, August 7, 1978, 78-2 CPD 97.

CONCLUSION

In our view, Navy has established prima facie support for the reasonableness of each allegedly restrictive specification and Polites has failed to sustain its burden to demonstrate that the requirements are clearly unreasonable. Further, since these matters have been considered on a number of separate occasions, we consider this decision to be dispositive of the issues which have been discussed. We think Polites has now had an ample opportunity to air its objections to these procurements.

The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States

August 7, 1981

Naval Regional Contracting Office
U.S. Naval Base, Bldg. #600
Phila., PA 19112

Re: N00140 81 R A274

ALTERNATE PROPOSAL

Vendor offers the following material and conditions.

Right angle and Swivel couplers are vendor's standard commercial product and meet the slippage and breakage requirements of Mil S 29180. The attached bolts are "T" type, low carbon steel, non-captive and are not ofset. Bolts will withstand a 125 lb. torque test. All fasteners are sheridized, coupler bodies and caps are hot dip galvanized.

Inspection and acceptance at source by DCAS. Testing costs to be buyer's. All prices are F.O.B. destination.

Packaging shall be 55 gal steel drums.

Delivery: first article inspection anytime after September 24, 1981. Balance of material according to buyer's schedule.

Ref. L31: (1.) Catolog is enclosed. (2) All items are sold primarily to industry. (3) All customers pay catolog prices.

Constantine N. Polites

POLITES OFFER $44,825
DIFFERENCE $ 8,027

NAVAL REGIONAL PROCUREMENT OFFICE
U.S. NAVAL BASE, BLDG NO. 600
PHILADELPHIA, PA. 19112

You were not the successful bidder on:

QUOTATION NO.	FOR
N0014081R A274	COUPLERS (ONLY) 44,7??

NUMBER OF CONTRACTORS SOLICITATED	NUMBER OF QUOTATIONS RECEIVED	TOTAL CONTRACT PRICE
18	4	52,852.75

OFFEROR RECEIVING AN AWARD (Name and Address)
[illegible]

Additional information may be requested from Contracting Officer, Naval Regional Procurement Office, Phila., Pa.

Your cooperation in quoting on Navy requirements is appreciated.

Naval Regional Procurement Office, Phila.

NOTE: The information given above is sent to all unsuccessful bidders immediately after award is made.

UNSUCCESSFUL BIDDER'S NOTICE

ALTERNATE PROPOSAL

SOLICITATION, OFFER AND AWARD

RATING D.O. C9E

PAGE 1 OF 22

2 SOLICITATION NO. N00140-81-R-A274 — ADVERTISED (IFB) — NEGOTIATED (RFP)

3 DATE ISSUED 81 AUG 4

4 REQUISITION/PURCHASE REQUEST NO. 1099-0503 1117 13 1117-9508 N00151-1103-95 1134-9502 TO 05

7 ISSUED BY P327:MDC:ND CODE N00140

NAVAL REGIONAL CONTRACTING OFFICE
U. S. NAVAL BASE, BLDG. #500
PHILADELPHIA, PA. 19112

8 ADDRESS OFFER TO (If other than Item 7)

"SLEP"

SOLICITATION

9 Sealed offers in original and ONE copies for furnishing the supplies or services in the Schedule will be received at the place specified in Item 8, or if hand-carried, in the depository located in Bldg. Specified in Block #7 (1st floor) until 4:00 PM (hour) local time 18 AUG 1981 (date)

If this is an advertised solicitation, offers will be publicly opened at that time.

CAUTION — LATE OFFERS: See pars. 7 and 8 of Solicitation Instructions and Conditions.

All offers are subject to the following:

1 The Solicitation Instructions and Conditions, SF 33 A (Rev. 1-78) edition which is attached or incorporated herein by reference

2 The General Provisions, SF 32 _____ edition which is attached or incorporated herein by reference

3 The Schedule including herein and/or attached hereto.

4 Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in schedule.)

FOR INFORMATION CALL (Name & telephone no.) (No collect calls) ▶ Ms. Marilyn D. Caruso (215) 755-4830/4233

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OFFER (must be fully completed by offeror)

In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

10 DISCOUNT FOR PROMPT PAYMENT (See par. 9 SF 33 A)

% 10 CALENDAR DAYS % 20 CALENDAR DAYS % 30 CALENDAR DAYS % _____ CALENDAR DAYS

17 OFFEROR CODE _____ FACILITY CODE _____

NAME AND ADDRESS (Street, city, county, State and ZIP code)

CONSTANTINE N. POLITES & CO.
833 GUENTHER AVENUE
YEADON, PENNA. 19050

AREA CODE AND TELEPHONE NO. (Tel.) 215-625-1611

☐ Check if remittance address is different from above — Refer to Schedule

18 NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)

19 SIGNATURE

Constantine N. Polites

20 OFFER DATE 7AUG81

AWARD (To be completed by Government)

21 ACCEPTED AS TO ITEMS NUMBERED

22 AMOUNT

23 ACCOUNTING AND APPROPRIATION DATA

24 SUBMIT INVOICES (4 copies unless otherwise specified) TO ADDRESS SHOWN IN BLOCK _____

25 NEGOTIATED PURSUANT TO 10 U.S.C. 2304(a) 41 U.S.C. 252(c)

26 ADMINISTERED BY (If other than Item 7) CODE

27 PAYMENT WILL BE MADE BY CODE

28 NAME OF CONTRACTING OFFICER (Type or print)

29 UNITED STATES OF AMERICA

BY (Signature of contracting officer)

30 AWARD DATE

Award will be made on this form, or on Standard Form 26, or by other official written notice.

33-130 S/N 0102-LF-130-3301

PT 1

Standard Form 33 Part 1 (REV. 3-77)
Prescribed by GSA, FPR (41 CFR) 1-16.101

ACKNOWLEDGMENT OF AMENDMENTS
The offeror acknowledges receipt of amendments to the Solicitation for offers and related documents numbered and dated as follows:

AMENDMENT NO	DATE	AMENDMENT NO	DATE

SECTION B - SUPPLIES/SERVICES AND PRICES

SCHEDULE

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	LOT I - FIRST ARTICLE TESTING				
0001	PIPING, 24" PIPE, 13' LONG, WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1134-9502)	600	EA		
0002	PIPING, 24" 10' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1134-9503)	600	EA		
0003	PIPING 24" PIPE, 8' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1099-9502)	380	EA		
0004	PIPING, 24" PIPE, 6' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1127-9508)	375	EA		
0005	COUPLER, RIGHT ANGLE 24" x 2" (FIXED) (NC #1103-9503)	382	EA	$13.00	$7,566.-
0006	FIRST ARTICLE TEST SAMPLE SAME AS ITEM 0005	18	EA	$13.	$ 234.-
0007	COUPLER, RIGHT ANGLE 24" X 24" (FIXED) (NC #1127-9518; 625 ea) (NC #1134-9504-1882 ea)	2507	EA	$13.	$32,591.-
0008	FIRST ARTICLE TEST SAMPLE SAME AS ITEM 0007 (NC #1134-9504)	18	EA	$13.	$ 234.-
0009	COUPLER 24" x 24", SWIVEL (NC #1134-9505)	282	EA	$14.	$ 3,948.-
0010	FIRST ARTICLE TEST SAMPLE SAME AS ITEM 0009	18	EA	$14.	$ 252.-
	LOT II - FIRST ARTICLE TESTING WAIVED				
0001	PIPING, 24" PIPE, 13' FLONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE ENDS) (NC #1134-9502)	600	EA	$ [illegible]	$ [illegible]
0002	PIPING, 24' 10' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1134-9503)	600	EA		
0003	PIPING, 24" PIPE 8' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1099-9502)	380	EA		
0004	PIPING, 24" PIPE 6' LONG WITH TWIST LOCK FITTING TYPE (MALE AND FEMALE END) (NC #1127-9508)	375	EA		
0005	COUPLER, RIGHT ANGLE 24" x 2" (FIXED) (NC #1103-9503)	600	EA	13.00	$7,800

ACKNOWLEDGMENT OF AMENDMENTS The offeror acknowledges receipt of amendments to the Solicitation for offers and related documents numbered and dated as follows.	AMENDMENT NO	DATE	AMENDMENT NO	DATE

SECTION B - SUPPLIES/SERVICES AND PRICES

SCHEDULE

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	LOT II (cont'd)				
0006	COUPLER, RIGHT ANGLE, 2½" X 2½" (FIXED) (NC 81127-9518 - 625 ea) (NC 81134-9504; 1900 ea)	2525	EA	$13.00	32,825.—
0007	COUPLER, 2½" X 2½" (SWIVEL) (NC 81134-9505)	300	EA	$14.00	4,200.—
C	DESCRIPTION/SPECIFICATIONS				

ITEMS 0001 THROUGH 0004 - LOTS I OR II - Piping shall be provided IAW MIL-S-29180, as follows:

Paragraph 6.2 - Ordering data

a) Military Specification, MIL-S-29180 (NAVY) of 16 Feb 79.
b) Component VI
c) Not required
d) Not applicable
e) As specified in Sec. B - Item Description
f) Not required
g) Level C - packaging and packing required
h) Not required

ITEMS 0005 THROUGH 0010 (LOT I) OR ITEMS 0005 THROUGH 0007 (LOT II) - Couplers shall be provided IAW MIL-S-29180, as follows and with the below listed revisions/notes:

Paragraph 6.2 - Ordering data

a) Military Specification, MIL-S-29180 (NAVY) of 16 Feb 79.
b) (i) LOT I - Items 0005 through 0008 on LOT II - Items 0005 and 0006 - Component I - Right Angle Coupler
(ii) LOT I - Items 0009 and 0010 or LOT II - Item 0007 - Component II - Swivel Coupler Sizes as stated in Sec. B - Item Description.
c) First Article approval Testing is required
d) As required
e) Not applicable
f) Not required
g) Level A packaging and packing required
h) As specified

Note (1): First Article Approval Test may be waived if contractor has previously been given First Article Approval IAW MIL-S-29180 (NAVY) for subject items. If contractor requests waiver of First Article Approval Testing based on the above, he must submit with proposal the necessary certified documentation of prior approval.

Note (2): Frictional capacity - The units shall have a minimum frictional holding capacity of 2000 pounds in lieu of 4000 pounds as stated.

Note (3): Revision to paragraph 3.6 MIL-S-29180 - Right Angle Coupler add to paragraph 3.6 the following language:

Standard Form 33 (Rev. 3-77)
Prescribed by GSA
FAR (48 CFR) 53.214(c)

	CONTINUATION SHEET		
		81-R-A274	4

NAME OF OFFEROR OR CONTRACTOR

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT PRICE	

Note (3): (cont'd)

Coupler shall be right handed. Right hand can best be described as follows: When a worker using the left hand to install one half of the coupler on a horizontal pipe from underneath (horizontal hinge pin on the bottom) with the clamping nut facing the installer the clamping nut on the vertical half must be the right hand side of the vertical pipe readily accessible to the right hand of the installer.

Coupler shall be so configured that, when two couplers are butting against each other on the same pipe the distance between the centers of the couplers shall be 4 inches. This requirement is to ensure that the spacing between adjacent longitudinal and lateral members of staging vents can always be made the same without having to measure the spacing. Consistent spacing between horizontal members helps assure a truly square staging assembly.

D PACKAGING AND MARKING

MARKING CONTAINERS WITH NAVY NUMBERS

The outside markings of any carton/container and all shipping papers and packing slips contained therein must include a reference to the Navy (MC) Number appearing in the item description.

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
SEA 31125/CVM
4121/MIL-S-29180
Ser 2279
AUG 27 1981

SEE DISTRIBUTION LIST

Gentlemen:

The Naval Sea Systems Command will appreciate receiving your comments and recommendations on the enclosed document.

Comments should be forwarded to the Commander, Naval Sea Systems Command, SEA 3112, Department of the Navy, Washington, DC 20362 within 30 days from the date of this letter. If comments are not received, it will be assumed that you have none to offer on the enclosed document.

Your cooperation in reviewing the enclosed document and furnishing comments, if any, will be of valuable assistance and will be greatly appreciated.

Sincerely yours,

JEAN L. HARMAN
Head, DOD Standardization
Program and Documents Branch
By direction of Commander
Naval Sea Systems Command

Encl:
(1) One copy of proposed
MIL-S-29180 draft
dtd 26 August 1981

Industry Distribution List
for MIL-S-29180

Bil-Jax, Inc
P.O. Box 250
Archbold, Ohio 43502

Constantine N. Polites & Co.
833 Guenther Ave.
Yeadon, PA 19050

Patent Scaffolding Co.
2125 Center Avenue
Fort Lee, NJ 07024

Universal Mfg. Corp.
Zelienople, PA 16063

Waco Scaffold & Shoring Co.
P.O. Box 2301
South Alhambra Station
Alhambra, CA 91803

Waco Scaffolding & Shoring Co.
P. O. Box 66415
O'Hare Airport
Chicago, IL 60666

NOTE: This draft, dated 26 August 1981, prepared by the Naval Sea Systems Command, has not been approved and is subject to modification. DO NOT USE FOR ACQUISITION PURPOSES. (Project Number 5440-N008)

MIL-S-29180A(NAVY)

SUPERSEDING
MIL-S-29180(NAVY)
16 February 1979

MILITARY SPECIFICATION

SCAFFOLDING COMPONENTS, STEEL (PIPE, TUBE, AND COUPLER)

This specification is approved for use by the Naval Sea Systems Command, Department of the Navy, and is available for use by all Departments and Agencies of the Department of Defense.

1. SCOPE

1.1 Scope. This specification covers steel pipe, tube, and coupler scaffolding components including pipe, tubing, couplers, and associated fittings.

1.2 Classification. Pipe, tube and coupler scaffolding components shall be of the following components, sizes, lengths, types, and styles as specified (see 6.2 and 6.5):

Component I - Right angle coupler

Size 2 by 2-inch.
Size 2-1/2 by 2-inch.
Size 2-1/2 by 2-1/2-inch.

Component II - Swivel coupler.

Size 2 by 2 inch.
Size 2-1/2 by 2-inch.
Size 2-1/2 by 2-1/2-inch.

Component III - Twist lock fitting.

Size 2-inch tubing.
Size 2-inch pipe.
Size 2-1/2-inch pipe.

Type - male.
Type - female.

Beneficial comments (recommendations, additions, deletions) and any pertinent data which may be of use in improving this document should be addressed to: Commander, Naval Sea Systems Command, SEA 3112, Department of the Navy, Washington, DC 20362 by using the self-addressed Standardization Document Improvement Proposal (DD Form 1426) appearing at the end of this document or by letter.

FSC 5440

Component IV - Pipe and tubing.

Size 2-inch tubing.
Size 2-inch pipe.
Size 2-1/2-inch pipe.

Length - 6 feet.
Length - 8 feet.
Length - 10 feet.
Length - 13 feet.

Type - with twist lock fitting.
Type - without twist lock fitting.

Component V - Floor plate.

Size 2-inch tubing.
Size 2-inch pipe.
Size 2-1/2-inch pipe.

Type - with twist lock fitting.
Type - with female cylinder.

Component VI - Caster.

Size 2-inch tubing.
Size 2-inch pipe.
Size 2-1/2-inch pipe.

Type - with twist lock fitting.
Type - with female cylinder.

Style - with rubber wheels.
Style - with steel wheels.

2. APPLICABLE DOCUMENTS

2.1 Government documents.

2.1.1 Specifications and standards. Unless otherwise specified, the following specifications and standards of the issue listed in that issue of the Department of Defense Index of Specifications and Standards (DoDISS) specified in the solicitation form a part of this specification to the extent specified herein.

SPECIFICATIONS

FEDERAL

QQ-S-781 - Strapping, Steel, and Seals.
PPP-B-601 - Boxes, Wood, Cleated-Plywood.
PPP-B-621 - Boxes, Wood, Nailed and Lock Corner.
PPP-B-636 - Boxes, Shipping, Fiberboard.

STANDARDS

MILITARY
MIL-STD-105 - Sampling Procedures and Tables for Inspection by Attributes.
MIL-STD-129 - Marking for Shipment and Storage.

(Copies of specifications and standards required by manufacturers in connection with specific acquisition functions should be obtained from the contracting activity or as directed by the contracting officer.)

2.2 Other publications. The following documents form a part of this specification to the extent specified herein. The issues of the documents which are indicated as DoD adopted shall be the issue listed in the current DoDISS and the supplement thereto, if applicable.

AMERICAN NATIONAL STANDARDS INSTITUTE (ANSI)
ISO/R261 - ISO Metric Screw Threads, General Plan, 0.25 to 300 mm.

(Application for copies should be addressed to the American National Standards Institute, 1430 Broadway, New York, NY 10018.)

AMERICAN SOCIETY FOR TESTING AND MATERIALS (ASTM)
A 36 - Structural Steel. (DoD adopted)
A 47 - Malleable Iron Castings. (DoD adopted)
A 120 - Pipe Steel Black and Hot-Dipped Zinc Coated (Galvanized) Welded and Seamless, for Ordinary Uses. (DoD adopted)
A 123 - Zinc (Hot Galvanized) Coatings on Products Fabricated from Rolled, Pressed, and Forged Steel Shapes, Plates, Bars and Strip. (DoD adopted)
A 153 - Zinc Coating (Hot Dip) on Iron and Steel Hardware. (DoD adopted)
A 370, Sup III - Mechanical Testing of Steel Products, Methods and Definitions for. (DoD adopted)
A 449 - Quenched and Tempered Steel Bolts and Studs. (DoD adopted)
A 501 - Hot-Formed Welded and Seamless Carbon Steel Structural Tubing.
A 563 - Carbon and Alloy Steel Nuts. (DoD adopted)
A 668 - Steel Forgings, Carbon and Alloy, for General Industrial Use. (DoD adopted)

(Application for copies should be addressed to the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103.)

AMERICAN WELDING SOCIETY, INC. (AWS)
D1.1 - Structural Welding Code.

(Application for copies should be addressed to the American Welding Society, Inc., 2501 N.W. 7th Street, Miami, FL 33125.)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AGENT
National Motor Freight Classification.

(Application for copies should be addressed to the National Motor Freight Traffic Association, Inc., ATA Traffic Department, 1616 P Street, N.W., Washington, DC 20036.)

UNIFORM FREIGHT CLASSIFICATION RATINGS, RULES AND REGULATIONS
Uniform Freight Classification.

(Application for copies should be addressed to the Uniform Classification Committee, Agent Tariff Publication Officer, Room 1106, 222 South Riverside Plaza, Chicago, IL 60606.)

(Industry association specifications and standards are generally available for reference from libraries. They are also distributed among technical groups and using Federal agencies.)

2.3 Order of precedence. In the event of a conflict between the text of this specification and the references cited herein, the text of this specification shall take precedence.

3. REQUIREMENTS

3.1 Description. Pipe, tube, and coupler scaffolding components are the fundamental building units of engineered scaffold structures (see 6.1).

3.2 First article. When specified (see 6.2), scaffolding components of the type, style, length, and size shall be subjected to first article inspection (see 4.3 and 6.4).

3.3 Standard commercial product. Each scaffolding component of the same classification shall, as a minimum, be in accordance with the requirements specified herein and may be the manufacturer's standard commercial product. Additional or better features which are not specifically prohibited by this specification but which are a part of the manufacturer's standard commercial product, shall be included in the unit being furnished. A standard commercial product is a product which has been sold or is being currently offered for sale on the commercial market through advertisements or manufacturer's catalogs, or brochures, and represents the latest production model.

3.4 Materials. Materials used shall be free from defects which would adversely affect the performance or maintainability of individual components or of the overall assembly. Materials not specified herein shall be of the same quality used for the intended purpose in commercial practice. Unless otherwise specified herein, all equipment, material, and articles incorporated in the work covered by this specification are to be new and fabricated using materials produced from recovered materials to the maximum extent possible without jeopardizing the intended use. The term "recovered materials" means materials which have been collected or recovered from solid waste and reprocessed to become a source of raw materials, as opposed to virgin raw materials. None of the above shall be interpreted to mean that the use of used or rebuilt products are allowed under this specification unless otherwise specified.

3.5 Interchangeable items. All scaffolding components of the same classification, furnished under any specific contract, shall be physically and mechanically interchangeable. This requirement includes parts, assemblies, components, and accessories. No deviation will be acceptable.

3.6 Right angle coupler. The right angle coupler shall have two drop forged caps, a drop forged one piece body, and a securing bolt for each cap. Forgings shall conform to ASTM A 668. Body and caps shall be

contoured to fit the outside diameter of the applicable pipe or tubing size. Coupler bodies shall be 4 inches ± 1/4 inch wide for 2-inch pipe or tubing and 4-1/2 inches ± 1/4 inch wide for 2-1/2-inch pipe. Each cap shall hinge on an annealed steel pin and shall be provided with an opening to receive the bolt without removing the nut. The cap shall be designed so as to swing from fully closed to fully open in an approximate arc of 90 degrees. A hinge stop shall be incorporated to maintain this 90 degree angle for the fully open position. The cap shall also be provided with a minimum 1/16-inch lip to prevent the bolt from slipping out of the opening after tightening. The two bolts shall meet the requirements of 3.13.2.1 and shall be either 1/2-13 NC-2A or M14 captive bolts capable of movement only in a radial plane into and out of the cap opening for assembly or disassembly. Nuts shall meet the requirements of 3.13.2.2 and shall be 1/2-13 NC-2B or M14 heavy hex single chamfered or collar nuts of suitable dimensions to permit use of a 7/8-inch wrench for tightening. M14 nuts shall be used only with M14 bolts. The 1/2-13 NC-2B nuts shall be used only with 1/2-13 NC-2A bolts. Thread length of the bolt shall be sufficient to insure that three or more unused threads shall remain visible after the bolt has been torqued to the maximum test torque specified in ..8.1.4. The bolt end threads on assembled couplers shall be upset to discourage removal of the nut for field replacement and to prevent loss of the nut during disassembly. Unless otherwise specified (see 6.2), the coupler shall be of right-handed configuration as defined in 6.7. The bolt-nut-coupler assembly shall withstand a torque of 125 foot-pounds (ft-lb) in a nonlubricated condition. The coupler shall be furnished as an assembled unit. The unit shall have a minimum frictional holding capacity of 2,000 pounds (lb), and shall support a load of 6,000 lb without rotating in excess of 10 degrees (see figure 1). Unless otherwise specified (see 6.2), the unit shall withstand a minimum of 16,000 lb tensile pull. The coupler assembly shall be finished in accordance with 3.12.

3.7 Swivel coupler. The swivel coupler shall conform to the requirements of 3.6 except that the body shall be provided in two pieces joined by the manufacturer's standard connection. The connection shall allow turning of the coupler to any desired angle. The unit shall have a minimum frictional holding capacity of 2,000 lb. The unit shall support a load of 3,000 lb without rotating in excess of 10 degrees and shall withstand a minimum of 7,000 lb of tensile pull.

3.8 Twist lock fittings. Twist lock fittings shall consist of a male fitting and a female fitting. The female fittings shall either be malleable iron castings conforming to ASTM A 47 or steel forgings conforming to ASTM A 668. The male fittings shall be steel forgings conforming to ASTM A 668. The male fitting shall be nominal 4 inches in length with a minimum of 2-inch length available to be press fit into the tube or pipe and then be attached to the tube or pipe by the manufacturer's standard method of attachment. The twist locking portion shall be nominal 15/16-inch diameter with two tapered, locking lugs of the manufacturer's standard configuration. Female fitting shall have a minimum of 2-inch length to be press fit into the tube or pipe and then be attached to the tube or pipe by the manufacturer's standard method of attachment. The fitting shall accept the male twist locking portion and lock with a 90 degree rotation. The maximum outside diameter of the coupler shall conform to the outside diameter of the pipe or tube, so that the joint is smooth

and flush. When installed in a pipe or tubing, the twist lock fitting-pipe or tube assembly shall withstand a tensile force of 4,000 lb and a compressive force of 20,000 lb. The twist lock fitting shall be finished in accordance with 3.12.

3.9 Pipe and tubing. Tubing shall be high strength, structural steel tubing and shall be 1.90-inch outside diameter and 0.095 inch minimum wall thickness, for 2-inch designated size. Minimum yield strength shall be 50,000 pounds per square inch (lb/in^2) and ultimate tensile strength shall be 75,000 lb/in^2. Pipe shall conform to ASTM A 501 as referenced in ASTM A 36 and shall be 1.90-inch outside diameter and 0.145-inch minimum wall thickness for 2-inch designated size (ASTM A 501 1-1/2 inch nominal size) and 2.375-inch outside diameter and 0.154-inch minimum wall thickness for 2-1/2-inch designated size (ASTM A 501 2-inch nominal size). Tubing and pipe shall be either 2-inch tubing, 2-inch pipe, or 2-1/2-inch pipe, as specified (see 6.2); with or without a female twist lock fitting conforming to 3.8 attached to one end and a male twist lock fitting conforming to 3.8 attached to the other end, as specified (see 6.2), and in the length specified (see 6.2). Pipe and tubing shall be finished in accordance with 3.12.

3.10 Floor plate. The floor plate shall be either a malleable iron casting conforming to ASTM A 47 or a weldment made up of a steel plate and a suitable fitting or cylinder. The plate shall be nominal 8-inch diameter or 6-inch by 6-inch square of 0.25 inch minimum thickness for four equally spaced 9/16-inch screw holes near the perimeter for mounting purposes. The base shall be furnished with either a twist lock fitting conforming to 3.8 or with a minimum 4-inch length cylinder or steel bar stock sized to accept the outside diameter of the applicable pipe or tubing as specified (see 6.2). When the floor plate, fitted with a cylinder, is specified, the cylinder shall be fitted with a thumb screw to lock the floor plate assembly to the scaffold member. The plate shall withstand a shear force of 5,000 lb and a compressive force of 20,000 lb. The floor plate shall be finished in accordance with 3.12.

3.11 Caster. Casters shall be nominal 8-inch diameter with steel or rubber wheels as specified (see 6.2). Caster shall be provided with a foot actuated locking device. Caster shall either be provided with a male twist lock fitting conforming to 3.8, or with a minimum 4-inch length cylinder, sized to accept the outside diameter of the applicable pipe or tubing as specified (see 6.2). When the caster, fitted with the cylinder, is specified, the cylinder shall be provided with a thumb screw to lock the caster assembly to the scaffold member. The steel wheel assembly shall support a load of 8,000 lb. The rubber wheel caster assembly shall support a load of 500 lb. The caster shall be clearly marked in the safe working load as assembled. The caster assembly, except for the rubber wheels shall be finished in accordance with 3.12.

3.12 Finish. Scaffolding components to be finished, other than steel tubing or pipe shall be finished in accordance with ASTM A 153. Finish of structural steel tubing, after cutting and seam welding of the tube, shall conform to ASTM A 123. Finish of steel pipe shall conform to ASTM A 120.

3.13 Workmanship.

3.13.1 Steel fabrication. The steel used in fabrication shall be free from kinks, sharp bends, and other conditions which would be deleterious to the finished product. Manufacturing processes shall not reduce the strength of the steel to a value less than intended by the design. Manufacturing processes shall be done neatly and accurately. All bends shall be made by controlled means to insure uniformity of size and shape.

3.13.2 Bolted connections. Bolt holes shall be accurately punched or drilled and shall have the burrs removed.

3.13.2.1 Bolts. Bolts shall conform to ASTM A 449 for quenched and tempered medium carbon steel bolts with a minimum tensile strength of 120,000 lb/in^2. Bolts shall be commercially smooth and free from burrs, laps, seams, cracks or other defects which would make them unsuitable for the intended application. Metric threads shall conform to ANSI ISO/R261.

3.13.2.2 Nuts. Nuts shall conform to ASTM A 563 for heavy hex nuts for use with quenched and tempered medium carbon steel bolts. Metric thread shall conform to ANSI ISO/R261.

3.13.3 Riveted connections. All rivet holes shall be accurately punched or drilled and shall have the burrs removed.

3.13.3.1 Rivets. Rivets shall conform to industry standard for carbon steel rivets. Rivets shall completely fill the hole. Rivet heads shall be of an approved shape and shall be concentric with the rivet. Rivet head shall make full contact with the intended surface. The rivets shall be so fabricated as to develop a joint strength not less than the design value. Rivets shall be commercially smooth and free from cracks (burst), duds or other defects which would make them unsuitable for the intended application.

3.13.4 Welding. Surfaces to be welded shall be free from foreign matter which would be injurious to the weld. Welding procedures shall be in accordance with AWS D1.1. Welds shall be of sufficient size and shape to develop the full design strength of the parts connected by the welds. Welds shall transmit imposed stresses without permanent deformation or failure when subjected to proof or service loadings.

3.13.4.1 Welder qualification. All welders shall be qualified for the types of welds and for welding positions required for use in the fabrication of each unit. Qualification shall be on the type of base material and filler utilized in actual construction or on similar alternate materials not requiring operator requalification. Welder qualification shall be performed in accordance with the applicable sections of AWS D1.1. Copies of the qualification record for each qualified welder shall be kept by the manufacturer or contractor and shall be available to authorized government inspectors.

3.13.5 Castings. Castings shall be ferritic malleable iron conforming to ASTM A 47 malleable iron castings. No repairing, plugging, or welding of any kind shall be permitted. Castings surface shall be

smooth and free from scale and burned on sand. Castings shall be sound and free of misplaced coring, warping or any other defect which reduces the ability of the casting to perform the intended function.

3.13.5 Forgings. Forgings shall conform to ASTM A 668 for steel forgings for general industrial use. Forgings shall be sound and free from cold shuts, laps, folds, chops, or any other defect which reduces the ability of the forging to perform the intended function.

4. QUALITY ASSURANCE PROVISIONS

4.1 Responsibility for inspection. Unless otherwise specified in the contract or purchase order, the contractor is responsible for the performance of all inspection requirements as specified herein. Except as otherwise specified in the contract or purchase order, the contractor may use his own or any other facilities suitable for the performance of the inspection requirements specified herein, unless disapproved by the Government. The Government reserves the right to perform any of the inspections set forth in the specification where such inspections are deemed necessary to assure supplies and services conform to prescribed requirements.

4.1.1 Certificate of compliance. Where certificates of compliance are submitted, the Government reserves the right to check test such items to determine the validity of the certification (see 6.3).

4.2 Classification of inspections. The inspection requirements specified herein are classified as follows:

(a) First article inspection (see 4.3).
(b) Quality conformance inspection (see 4.4).
(c) Packaging inspection (see 4.10).

4.3 First article inspection. First article inspection shall be performed on one complete scaffolding component of each type furnished when a first article sample is required (see 3.2 and 6.2). This inspection shall include the examinatin of 4.7 and the applicable tests of 4.8. All tests required for a component of a particular classification shall be performed on a single test unit in the order in which they are specified in 4.8. The first article may be a standard production item from the contractor's current inventory, provided the scaffolding component meets the requirements of this specification and is representative of the design, construction, and manufacturing technique applicable to the remaining scaffolding components of that type to be furnished under the contract.

4.4 Quality conformance inspection. Quality conformance inspection shall be performed on the sample scaffolding components selected in accordance with 4.6. This inspection shall include the examination of 4.7 and the tests of 4.8, which are applicable to the component being inspected.

4.4.1 Certification. A certificate of compliance shall be prepared certifying that the materials used for the couplers, bolts, nuts, pipe, tubing, and accessories conform to the specified requirements of 3.6 through 3.12 (see 6.3).

4.5 Inspection lot. All components from a single manufacturer of the same size, type, length, and style as applicable, offered to the Government at one time, shall be considered a lot for purpose of inspection.

4.6 Sampling. A random sample of components shall be selected from each lot in accordance with MIL-STD-105.

4.6.1 Sampling for examination. Examination of the components shall be based on inspection level II and an Acceptable Quality Level (AQL) of 2.5 percent defective.

4.6.2 Sampling for tests. Tests of the components shall be based on inspection level S-2 and an AQL of 4.0 percent defective.

4.7 Examination. Each sample selected in accordance with 4.6.1 shall be examined for compliance with the requirements specified herein. Any modification of the contractor's standard product to comply with specified requirements, or any necessary modification following failure to eet specified requirements shall receive particular attention for adequacy and suitability. This element of inspection shall encompass all visual examinations and dimensional measurements. Examination shall be conducted as specified in table I.

TABLE I. List of defects.

Paragraph	Defect
3.4	Material not as specified, obviously defective, damaged or not suitable for the intended purpose.
3.5 through 3.11	Components of the same classification not physically and mechanically interchangeable as specified. Dimensions not within tolerances specified.
3.12	Finish not as specified.
3.13 through 3.13.4	Workmanship does not meet the requirements and standards specified.

4.8 Tests. Each sample selected in accordance with 4.6.2 shall be tested to determine compliance with the requirements specified herein. Tests shall be conducted on each sample selected and shall be conducted in the order set forth in the applicable test section for the sample being tested. Any visible or measureable permanent deformation in the test sample, or failure of the sample to meet any applicable test requirement, shall constitute failure of the sample.

4.8.1 Right angle coupler tests.

4.8.1.1 Test for rotation under load. The coupler, connecting two tubes at right angles and restrained from slipping on the vertical tube (see figure 1), shall be subjected to a load of 6,000 lb applied to the horizontal tube. During this test the coupler shall not rotate through an angle exceeding 10 degrees from the horizontal. Each gripping surface of the coupler shall be so tested in both directions. Coupler nuts shall be torqued to 50 ± 5 ft-lb for this test.

4.8.1.2 Test for slip. The coupler, connecting two tubes at right angles shall be subjected to a load of 2,000 lb applied to the horizontal tube, as shown in figure 2, with less than 0.25 inch vertical slip. During this test, the coupler shall not rotate through an angle exceeding 10 degrees from the horizontal. Each gripping surface of the coupler shall be so tested in both directions. Coupler nuts shall be torqued to 50 ± 5 ft-lb for this test.

4.8.1.3 Test for tensile strength. Unless otherwise specified (see .6 and 6.2), the coupler, connecting two tubes at right angles, shall be subjected to a minimum load of 16,000 lb in tension, as shown in figure 3, without failure of the coupler. Coupler nuts shall be torqued to 50 ± 5 ft-lb for this test.

4.8.1.4 Torque test. Each section of the coupler shall be clamped to a tube and the coupler-bolt-nut assembly torqued to a value of 125 ft-lb in a dry nonlubricated condition. During this test the coupler-bolt-nut assembly shall undergo no permanent deformation.

4.8.2 Swivel coupler tests.

4.8.2.1 Test for rotation under load. The coupler, connecting two tubes at right angles and prevented from slipping on both tubes (see figure 1) shall be subjected to a load of 3,000 lb. During this test the coupler shall not rotate through an angle exceeding 10 degrees from the horizontal. Each gripping surface of the coupler shall be so tested in both directions. Coupler nuts shall be torqued 50 ± 5 ft-lb for this test.

4.8.2.2 Test for slip. The coupler, connecting two tubes at right angles, shall be subjected to a load of 2,000 lb applied to the horizontal tube, as shown in figure 2, with less than 0.25-inch vertical slip. During this test, the coupler shall not rotate through an angle exceeding 10 degrees from the horizontal. Each gripping surface of the coupler shall be so tested in both directions. Coupler nuts shall be torqued 50 ± 5 ft-lb for this test.

4.8.2.3 Test for tensile strength. The coupler connecting two tubes at right angles, shall be subjected to a load of 7,000 lb in tension, as shown in figure 3, without failure of the coupler. Coupler nuts shall be torqued to 50 ± 5 ft-lb for this test.

4.8.2.4 Torque test. The coupler shall be tested in accordance with 4.8.1.4.

4.8.3 Twist lock fitting tests.

4.8.3.1 Test for tensile strength. A twist lock fitting assembly connecting two tubes (see figure 4), shall be subjected to a tensile load of 4,000 lb with no more than 0.25 inch slip and with no failure of the fitting.

4.8.3.2 Test for compressive strength. A twist lock fitting assembly connecting two tubes (see figure 5), shall be subjected to a compressive load of 20,000 lb with no permanent deformation or failure of the fitting.

4.8.4 Floor plate tests.

4.8.4.1 Test for shear strength. The floor plate (see figure 6), shall be subjected to a shear load of 5,000 lb without failure of the floor plate.

4.8.4.2 Test for compressive strength. The floor plate (see figure), shall be subjected to a compressive load of 20,000 lb without failure of the floor plate.

4.8.5 Caster tests.

4.8.5.1 Test for compression, rubber wheel caster. The caster (see figure 8), shall be subjected to a load of 500 lb without failure or permanent deformation.

4.8.5.2 Test for compression, steel wheel caster. The caster (see figure 8), shall be subjected to a load of 8,000 lb without failure or permanent deformation.

4.9 Bolt tensile testing. Bolts shall be full size tensile tested to insure conformance to the tensile requirements (see 3.13.2.1). Tensile testing shall be done in accordance with supplement III of ASTM A 370. Manufacturer's certified test report for the last completed set of mechanical tests for the size of bolt shall be acceptable as indication of compliance with the tensile requirement for the bolt.

4.10 Packaging inspection. The preservation-packaging, packing, and marking of the scaffolding components shall be inspected to verify conformance to the requirements as specified herein.

5. PACKAGING

5.1 Preservation-packaging. Preservation-packaging shall be level A or C as specified (see 6.2).

5.1.1 Level A. Coupler, fittings, joint pins, and casters of like description shall be packaged in close-fitting boxes conforming to PPP-B-636, class weather resistant. The contents within the boxes shall be cushioned to prevent movement. The boxes shall be closed and sealed in accordance with method IV as specified in PPP-B-636. The floor plates shall be wired together with soft annealed wire in quantities of four each or as recommended by the contractor.

5.1.2 Level C. The scaffolding components shall be packaged in accordance with the standard practice of the contractor.

5.2 Packing. Packing shall be level A, B, or C as specified (see 6.2).

5.2.1 Level A.

5.2.1.1 Pipe and tubing. Unless otherwise specified (see 6.2), pipe and tubing of the same size and length shall be bundled in secured lifts not to exceed approximately 500 lb to form a nonshifting bundle. The pipe or tubing shall be arranged and secured with steel strapping. Nominal 2- by 4-inch wood battens shall be placed beneath all straps on top, bottom, and sides of the bundle. Strapping shall be 0.025 by 3/4 inch conforming to QQ-S-781, class 1, type I or IV, finish B and shall be stapled to the battens. A minimum of three straps shall be provided on each bundle. The center strap shall be spaced not to exceed 12 inches from the center of the bundle. The end straps shall be placed not more than 18 inches from each end of the bundle.

5.2.1.2 Other components. The packaged couplers, fittings, pins, casters, and floor plates shall be packed in close-fitting boxes conforming to PPP-B-601, overseas type, or PPP-B-621, class 2. The contents shall be cushioned, blocked, and braced to prevent movement.

5.2.2 Level B. The scaffolding components shall be packed as specified for level A, except the boxes shall conform to PPP-B-601, domestic type, or PPP-B-621, class 1.

5.2.3 Level C. The scaffolding components shall be packed in a manner which will insure arrival at destination in satisfactory conditon and which will be acceptable to the carrier at lowest rates. Containers and packing shall comply with Uniform Freight Classifications Rules and Regulations or National Motor Freight Classification.

5.3 Marking. Interior packages, shipping containers, and bundles shall be marked in accordance with MIL-STD-129.

6. NOTES

6.1 Intended use. Steel 2-inch and 2-1/2-inch tube and coupler scaffolding components are inteded for use in engineered scaffold structures. Scaffold structures, using these components, may be defined as light duty, medium duty, or heavy duty, dependent on the desired load capacity and the resultant required post spacing as defined in CFR 1926.451 and ANSI 10.8. Scaffold structures to be erected utilizing the components specified herein should conform to the requirements of CFR 1926.451, ANSI 10.8, the SSI Recommended Scaffolding Erection Procedure and Scaffolding Safety Rules in addition to applicable local engineering guidelines. The components specified herein are not intended for use in construction of 3-1/2-inch outside diameter tube and coupler scaffolds.

6.2 Ordering data. Acquisition documents should specify the following:

(a) Title, number, and date of this specification.
(b) Component, size, length, type, and styles required (see 1.2).
(c) When a first article is required for inspection and approval (see 3.2, 4.3, and 6.4).
(d) When right angle couplers shall be other than right-handed configuration (see 3.6).
(e) When right angle couplers shall be tension tested at other than 16,000 lb (see 3.6 and 4.8.1.3).
(f) Whether pipe or tubing shall be furnished with twist lock fittings installed and length required (see 3.9).
(g) Whether steel or rubber wheels are required (see 3.11).
(h) Level of preservation-packaging and level of packing required (see 5.1 and 5.2).
(i) If level A packing of pipe and tubing is other than specified (see 5.2.1.1).

6.3 Contract data requirements. When this specification is used in an acquisition which incorporates a DD Form 1423, Contract Data Requirements List (CDRL), the data requirements identified below shall be developed as specified by an approved Data Item Description (DD Form 1664) and delivered in accordance with the approved CDRL incorporated into the contract. When the provisions of DAR 7-104.9 (n) (2) are invoked and the DD Form 1423 is not used, the data specified below shall be delivered by the contractor in accordance with the contract or purchase order requirements. Deliverable data required by this specification is cited in the following paragraphs.

Paragraph No.	Data requirements title	Applicable DID No.
4.1.1, 4.4.1, and 4.9	Certificates of Compliance	DI-E-2121

(Data item descriptions related to this specification, and identified in section 6 will be approved and listed as such in DoD 5000.19L., Vol. II, AMSDL. Copies of data item descriptions required by the contractors in connection with specific acquisiton functions should be obtained from the Naval Publications and Forms Center or as directed by the contracting officer.)

6.4 First article. When a first article is required, it shall be tested and approved under the appropriate provisions of paragraph 7-104.55 of the DAR. The first article should be a first production item consisting of one scaffolding component or it may be a standard production item from the contractor's current inventory as specified in 4.3. The contracting officer should include specific instructions in all acquisition instruments, regarding arrangement for examinations, tests, and approval of the first article.

6.4.1 First article inspection. Invitations for bids should provide that the Government reserves the right to waive the requirement for samples for first article inspection as to those bidders offering a product which

has been previously acquired or tested by the Government, and that bidders offering such products, who wish to rely on such production or test, must furnish evidence with the bid that prior Government approval is presently appropriate for the pending contract.

6.5 Size designations. Designated sizes for scaffolding pipe and tubing vary from the standard nominal sizes as follows: 2-inch tubing and 2-inch pipe are 1.9-inch outside diameter and 2-1/2-inch pipe is 2.375-inch outside diameter. Other component designated sizes correspond to these actual dimensions.

6.6 Accessories. There are many additional scaffolding components available commercially. These items were not included in this specification since it was not the purpose of the specification to generate an exhaustive list of scaffolding components and accessories. If using activities find items not included, for which repeated procurements are required, they are requested to forward the attached DD 1426 to the preparing activity for consideration for inclusion of the items in a subsequent revision of this document.

6.7 Right-handed coupler configuration. The right-handed coupler configuration is defined with the following example: When a worker is using the left hand to install one half of the coupler on a horizontal pipe from underneath (horizontal hinge pin on bottom) with the clamping nut facing the installer, the clamping nut on the vertical half must be on the right hand side of the vertical pipe readily accessible to the right hand of the installer.

6.8 Changes from previous issue. Asterisks are not used in this revison to identify changes with respect to the previous issue due to the extensiveness of the changes.

Preparing activity:
Navy - SH
(Project 5440-N008)

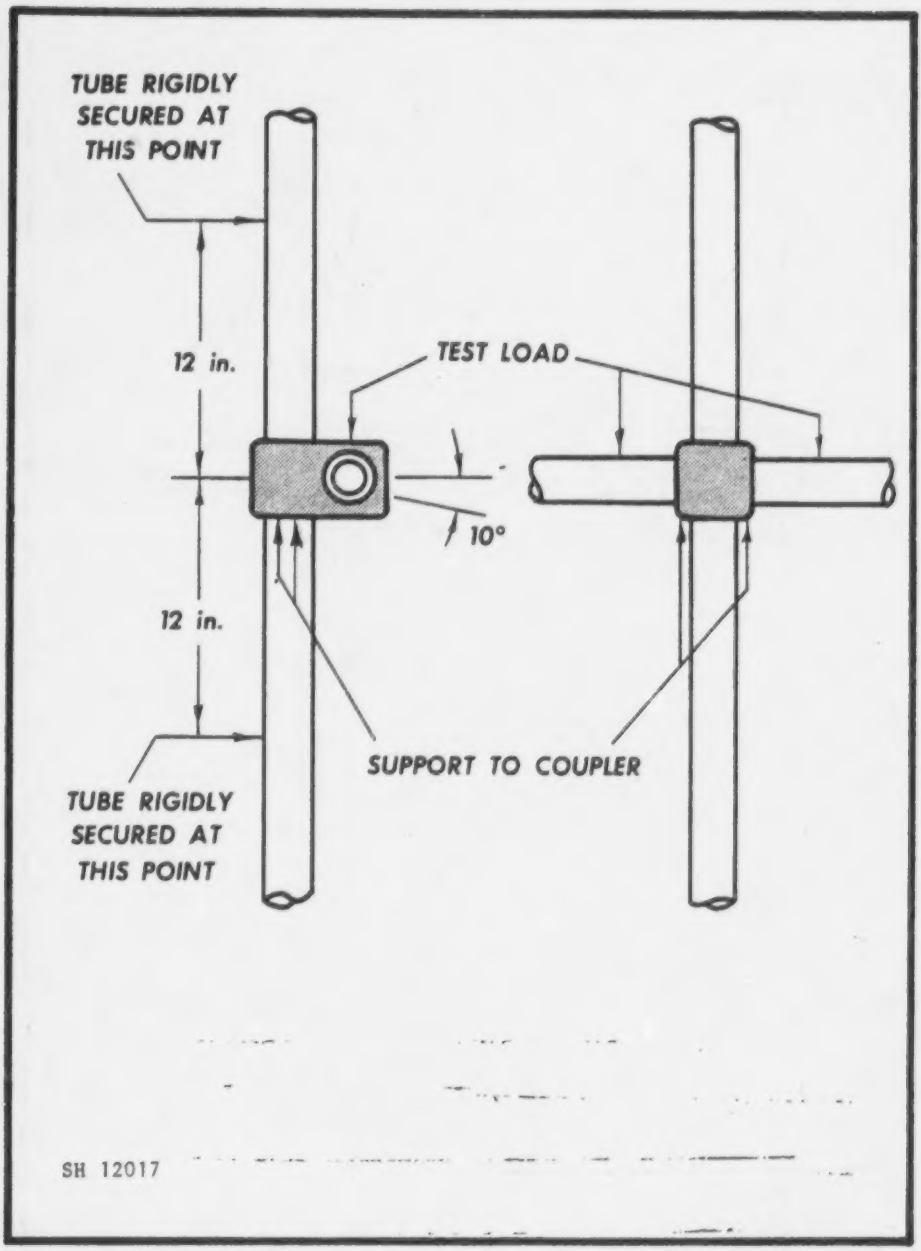


FIGURE 1. Test for distortion of right angle or swivel coupler.

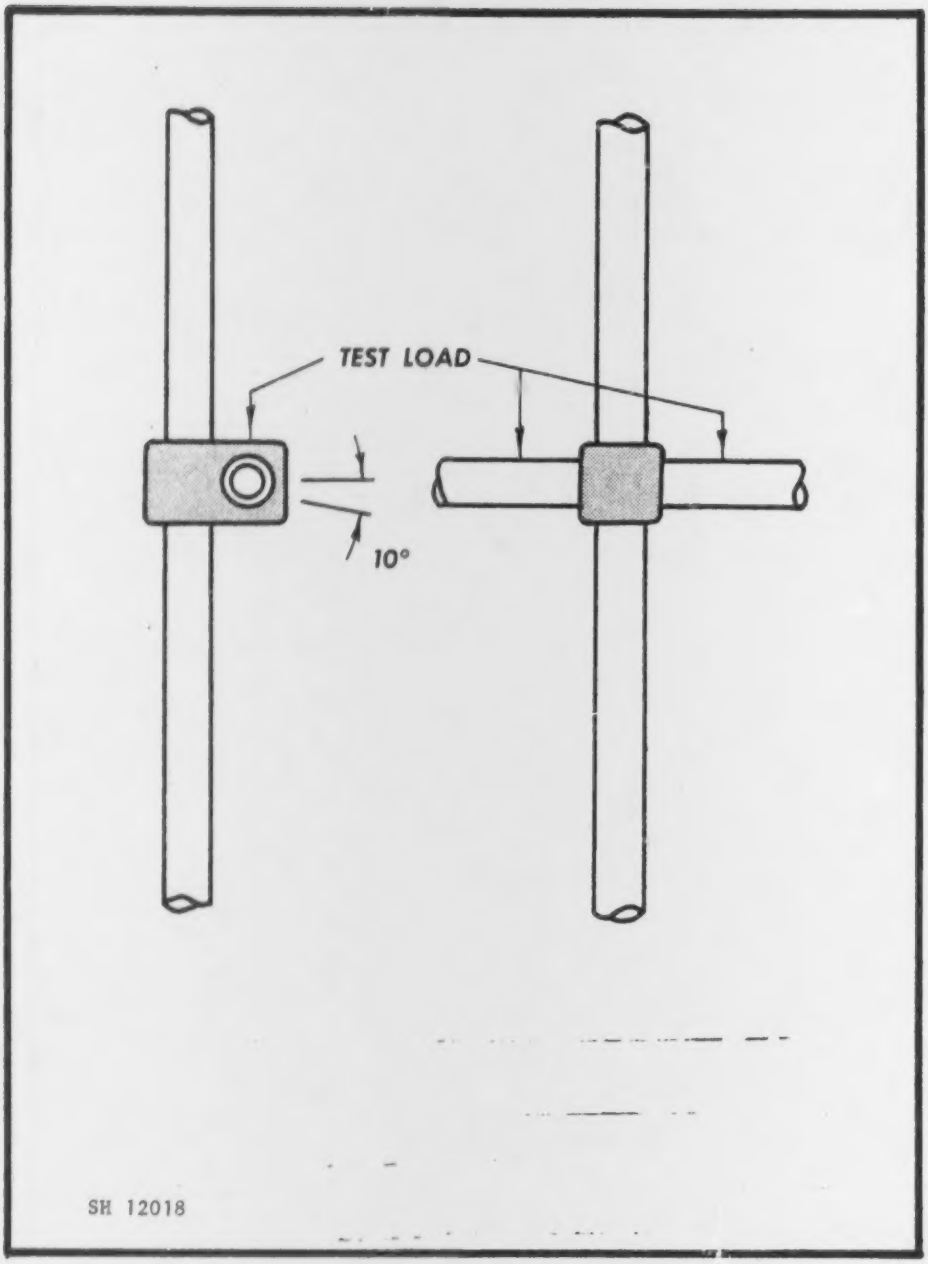
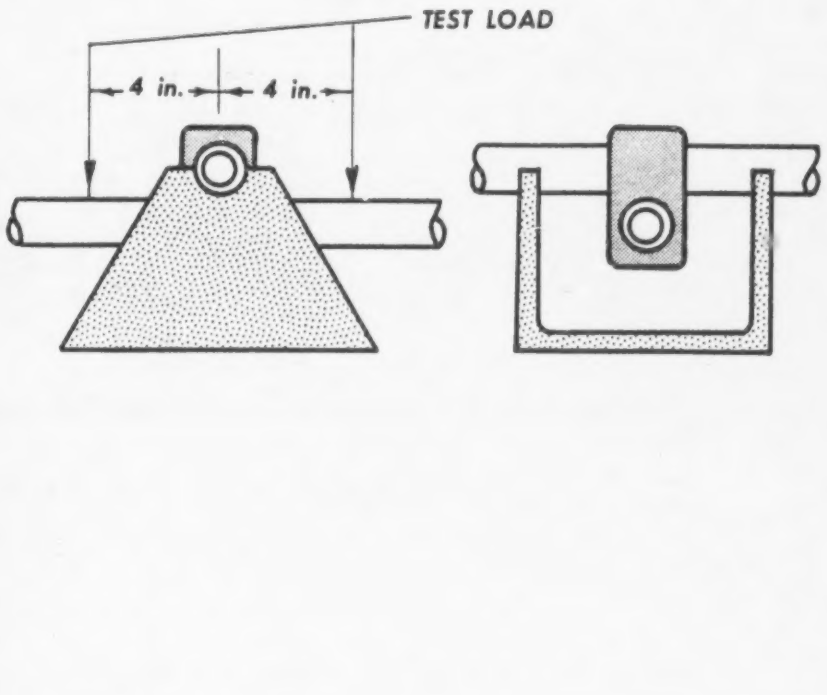


FIGURE 2. Test for slip of right angle or swivel coupler.



SH 12019

FIGURE 3. Test for tensile strength of righ angle or swivel coupler.

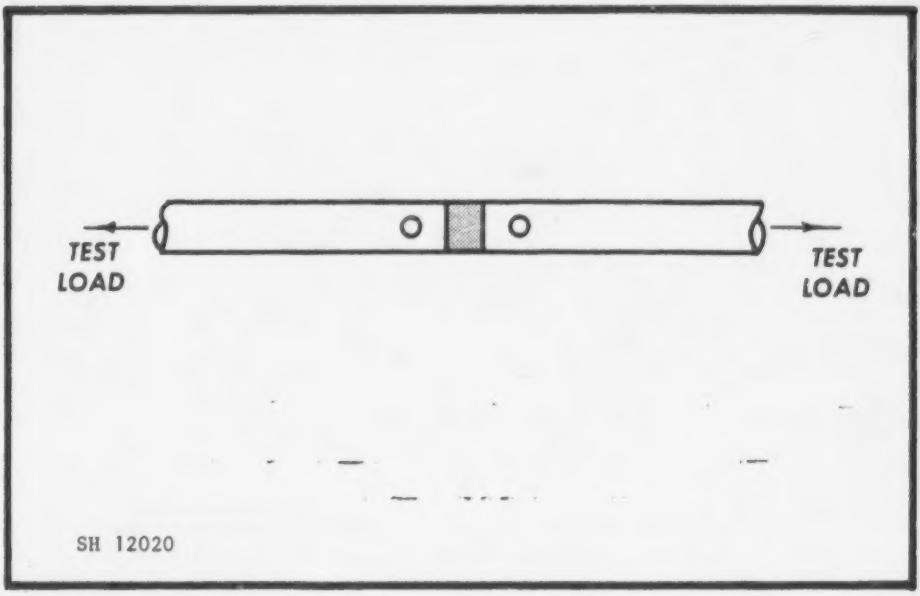


FIGURE 4. Test for tensile strength of twist lock couplers.

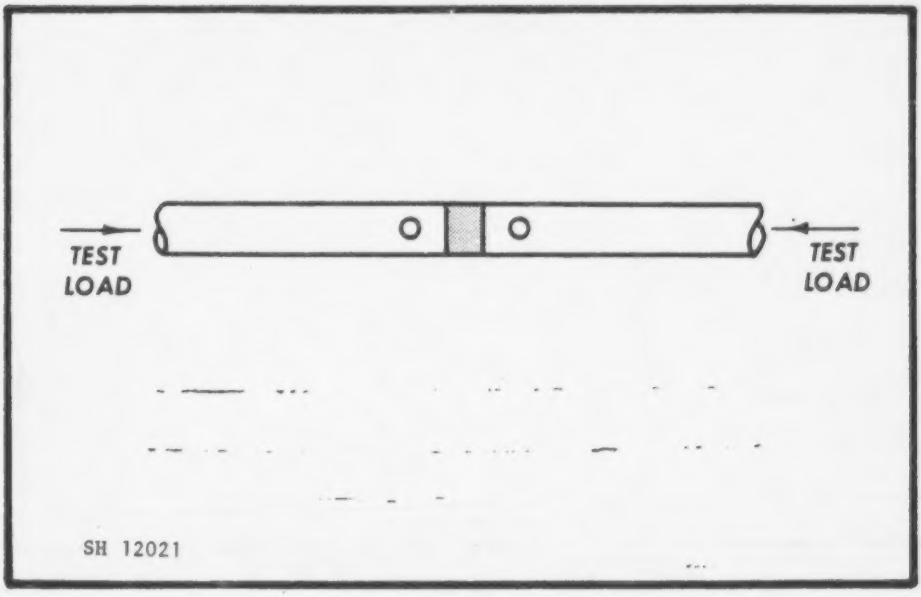


FIGURE 5. Test for compressive strength of twist lock couplers.

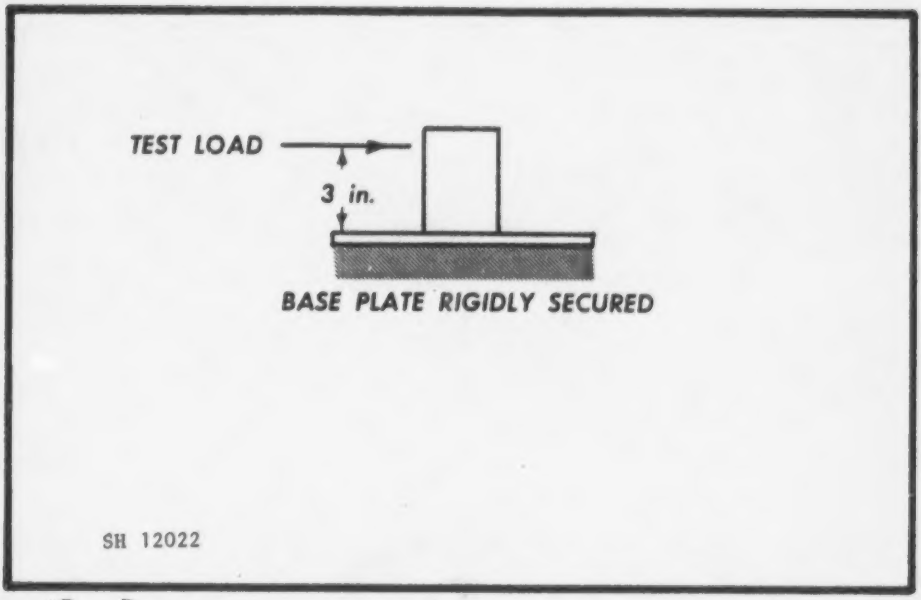


FIGURE 6. Test for shear of floor plate.

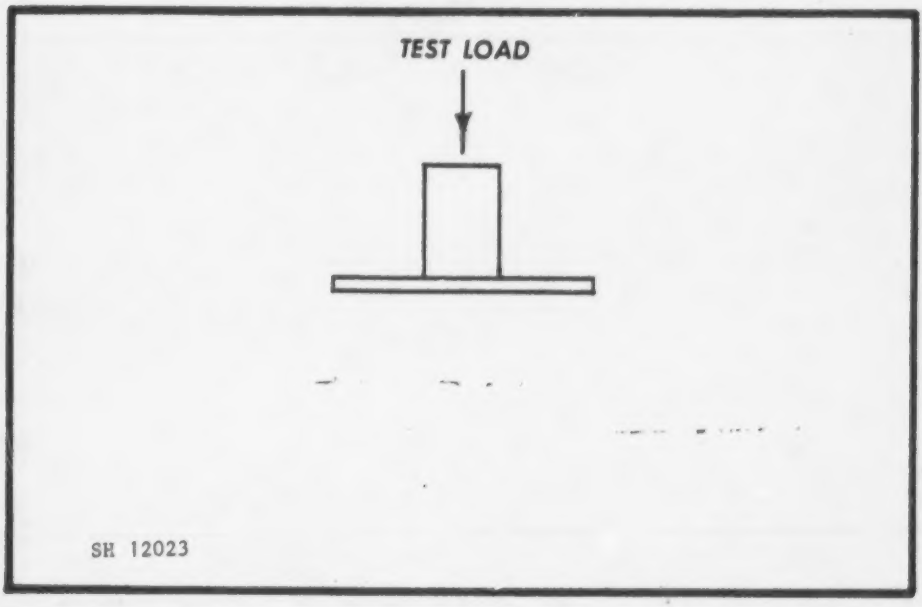


FIGURE 7. Test for compressive strength of floor plate.

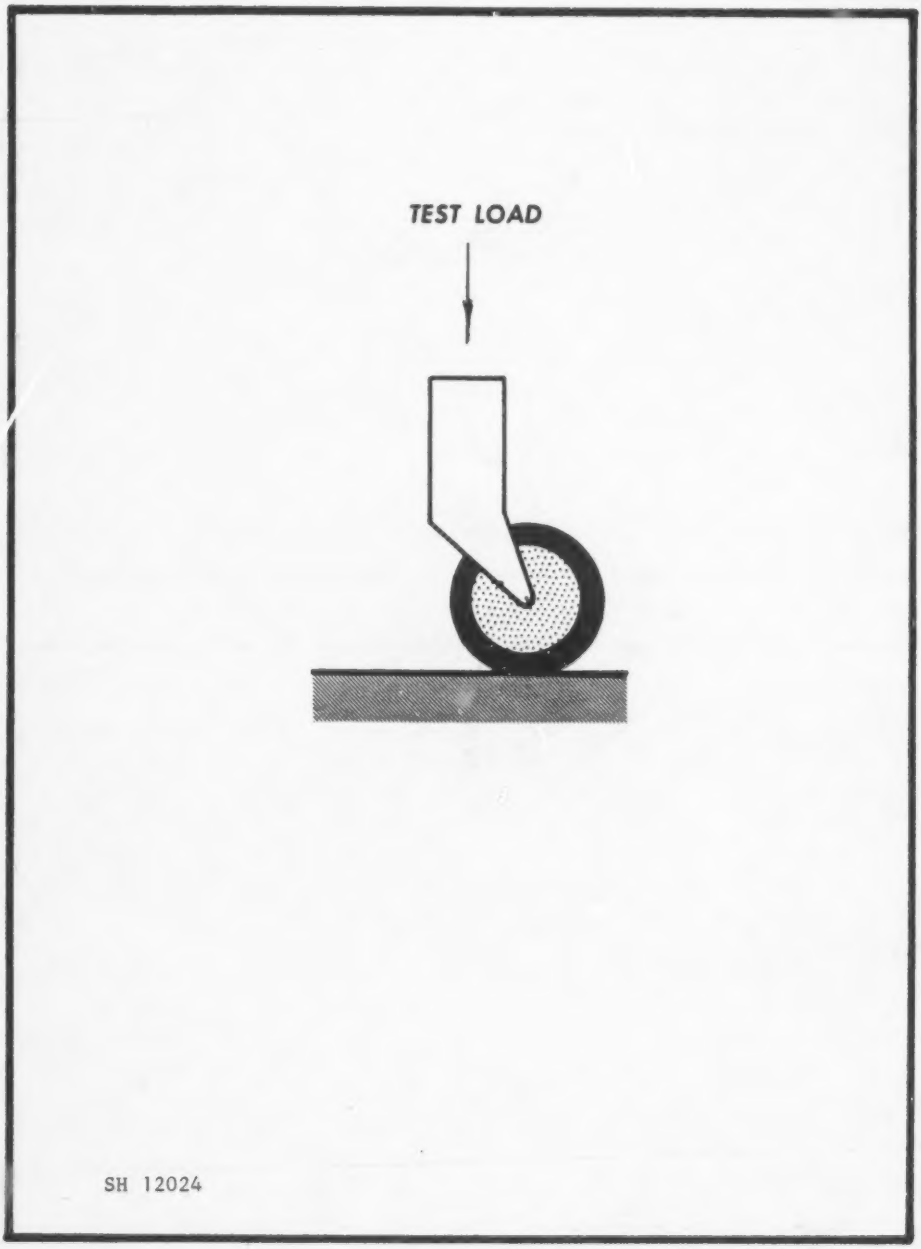


FIGURE 8. Test for compressive strength of caster.

This is an extract of a solicitation issue by the Tenn. Valley Authority.

Schedule of Prices

No. 70-597593
Page No.

ITEM NO.	ARTICLES OR SERVICES (GIVE DESCRIPTION AND CATALOG NO.)	QUANTITY	UNIT	UNIT PRICE (DOLLARS AND CENTS)	AMOUNT (DOLLARS AND CENTS)
	F.O.B. Yellow Creek Nuclear Plant near Iuka, Mississippi 38852 if by motor freight, UPS, or vendor's delivery.				
	Scaffolding and Accessories				
	Scaffold tube, 1.9" o.d., steel, yield strength not less than 50,000 psi, ultimate tensile strength not less than 75,000 psi, hot-dipped galvanized. Each length of tubing shall have a male twist lock fitting on one end and a female twist lock fitting on the other end. The scaffold tube shall be furnished in the lengths listed below.	Approx.			Approx.
1	6'0"	500	each		
2	8'0"	500	each		
3	10'0"	500	each		
4	13'0"	500	each		
5	Tube coupler, fixed right (90°) angle type, 1.9" x 1.9" o.d. tube size, hot-dipped galvanized, friction hold capacity not less than 4,000 lbs., tension pull capacity not less than 16,000 lbs. The coupler shall be furnished as an assembled unit with a one piece body complete with caps, bolts, nuts and pins. The caps shall be designed and constructed to receive the bolts without removing the nuts. The caps and body shall be contoured to fit the tubing.	3,000	each		
6	Tube coupler, swivel type (360° rotation), 1.9" x 1.9" o.d. tube size, hot-dipped galvanized, friction hold capacity not less than 4,000 lbs., tension pull capacity not less than 7,000 lbs. The coupler shall be furnished as an assembled unit with a two-piece body complete with caps, bolts, nuts, and pins. The caps shall be designed and constructed to receive the bolts without removing the nuts. The caps and body shall be contoured to fit the tubing.	3,000	each		
	Approx. Total				

TVA 5061 (DP-9-73)

BIDDER _____

PATENT SCAFFOLDING CO.
2125 Center Avenue, Fort Lee, N.J. 07024
(201) 461-8700
EXECUTIVE OFFICE
PSS

September 25, 1979

Purchase Division, Code 531.32
Norfolk Naval Shipyard
Portsmouth, Va. 23701

Gentlemen:

Attached herewith is our response to your Request for Quotation No. N00181-79-Q-T515/EMS, issued September 17, 1979.

All components furnished will be in accordance with MIL-S-29180 (NAVY), dated February 16, 1979 and also meet the exception to this MIL-Spec, as described in your Request for Quotation, with the following exceptions:

Par. 3.6, in the third from the last sentence "the components should have a minimum frictional holding capacity of 4,000 lb". Our couplers have a minimum frictional holding capacity of 2,500 lb.

Par. 4.8.1.2 Test for Slip. "The coupler, connecting two tubes at right angles (see Figure 2), shall be capable of supporting a load of 4,000 lb applied to the horizontal tube with less than 0.25 inch vertical slip." The minimum load value for our couplers for this test will be 2,500 lb.

The reason for our exception is that the 4,000 lb requirement is too rigid and unnecessarily restrictive based on the successful use of hundreds of thousands of couplers in U.S. industry and by the Navy for decades. The 2,500 lb. value has been an accepted safe criteria in the U.S. To meet the 4,000 lb. Slip Requirement required by MIL-S-29180 (NAVY), we believe, would necessitate only bidding on couplers of a type that are inferior in design and performance to those which have been supplied to and successfully used by Navy Yards for decades. This inferior design would be the narrow, nominal 1¾" wide body and cap type with a three-part hinge (2 on the cap and 1 on the body), in lieu of a design which includes a 4" wide body and cap and five-part hinge (3 on the cap and 2 on the body), which has always been desired by the Navy Yards, and which has a proven record of safety, performance and durability extending over decades of use in U.S. Navy Yards, including the Norfolk Naval Shipyard.

Please be advised that we have filed a formal protest with the United States General Accounting Office, Office of General Counsel, concerning MIL-S-29180 (NAVY) with regard to the Slip Requirement contained in this Specification. We also wish to advise you that with the Slip Requirement reduction we are requesting for the reasons stated herein, our couplers will meet the "Intended Use" requirement for tube and coupler scaffolding components, as described in 6.1 of MIL-S-29180 (NAVY) as demonstrated by the successful use of these couplers furnished by us to the Norfolk Naval Shipyard for many years.

Very truly yours,

James P. Moreland
Vice President - Product Services

DEPARTMENT OF THE NAVY
PHILADELPHIA NAVAL SHIPYARD
PHILADELPHIA, PENNSYLVANIA 19112

Code 134.1 (JC)
Ser 77.22

3 March 1977

From: Code 134
To: Code 530

Subj: Pipe Staging Clamps, 2-1/2" x 2-1/2", Steel, Manufactured by Constantine N. Polites & Co. and Patent Scaffolding Co., Metallurgical Evaluation; report of

Encl: (1) Metallurgical Evaluation of Clamp Parts: Polites and Patent
(2) Breaking Load of Pipe Clamps

1. As requested by Code 530, clamps from subject manufacturers were metallurgically analyzed for conformity to Philadelphia Naval Shipyard requirements. Tests results, along with requirements, are presented in enclosure (1).

2. Two clamps from each manufacturer were also tested for breaking load. The test was performed in a tensile test machine simulating field installation. Tests results are presented in enclosure (2).

J. CAROSIELLO
By direction

METALLURGICAL EVALUATION OF CLAMP PARTS(1)

	Constantine N. Polites & Co.					Requirements			
	Type Steel	Condition	Hardness	Tensile Strength(2) (psi)	Size	Type Steel	Condition	Hardness	Tensile Strength (psi)
Body	1020	Forged (cooled from forging temp.)	Rb 85 - 86	80,000 to 81,000		1025 or 1030	Forged	(3)	(3)
Cap	1020	Forged (cooled from forging temp.)	Rb 88 - 89	85,000 to 87,000		1025 or 1030	Forged	(3)	(3)
Bolt Eye or T	1010	Normalized followed by cold work	Rb 89 - 90	87,000 to 89,000	7/16" x 14 THD	1030 to 1055	Quench and tempered	Rc 25 to 34	120,000 min.
Nut	1040	Quenched and tempered	Rc 30 - 31	136,000 to 140,000		(3)	(3)	(3)	(3)
Hinge Pin	1008	Normalized followed by cold work	Rb 90 - 91	89,000 to 91,000	0.360" dia.	1035 1038 1040	Annealed	(3)	(3)
Eye Bolt Pin	Does not contain pin because of design					1035 1038 1040	Annealed	(3)	(3)
	Patent Scaffolding Co.								
Body	1030	Forged (normalized after forging)	Rb 82 - 83	75,000 to 77,000		1025 or 1030	Forged	(3)	(3)
Cap	1030	Forged (normalized after forging)	Rb 83 - 84	77,000 to 78,000		1025 or 1030	Forged	(3)	(3)
Bolt Eye or T	1010	Mixed structure difficult to determine processing	Rb 86 - 89	81,000 to 87,000	1/2" x 13 THD	1030 to 1055	Quench and tempered	Rc 25 to 34	120,000 min.
Nut	1010	Normalized	Rb 83 - 84	77,000 to 78,000		(3)	(3)	(3)	(3)
Hinge Pin	1030	Spherodized annealed followed by cold work	Rb 91 - 93	91,000 to 96,000	0.375" dia.	1035 1038 1040	Annealed	(3)	(3)
Bolt	1030	Normalized	Rb 97 - 98	106,000 to 109,000	0.375" dia.	1035 1038 1040	Annealed	(3)	(3)

(1) Underlined result indicates nonconformity to requirement.

(2) Tensile strength [illegible]

a/c 215, LUdlow 6-3070

UNIVERSAL Technical Testing Laboratories, Inc.

Nondestructive and Physical Inspection for Industrial America

Woodlawn Avenue and North Street

Post Office Box 372, Collingdale, Pa. 19023

April 19, 1977

CONSTANTINE POLITES & COMPANY
833 Guenther Avenue
Yeadon, Pennsylvania 19050

Re: 2.3" Coupler Test
U.T.T.L. Job No. 9524

Gentlemen:

At 90 ft.-lbs. torque of the coupling bolt and in a compression test that simulates the field loading of a scaffold assembly, the results are as follows:

First coupler slipping at 6635# to 7500# for 1/4" until it made contact with the second coupler. The two couplers loaded to 13,750# and slipped with 1/4" until contact was made with the third coupler. All the couplers moved approximately 1/4" until failure of the first coupler. The slippage of all three occurred at 18,275# and failure, which was in the toggle bolt tongue, occured at 22,500#.

It should be pointed out that the above took place utilizing 2", Sch. 40 Pipe with a black finish and distortion took place in both the vertical and horizontal pipe at approximately 20,000#.

At 75 ft.- lbs. torque of the coupling bolt and in a compression test that simulates the field loading of a scaffold assembly, the results are as follows:

The first couplar started slipping at 6000# and slipped until 1/4" was traveled. Then the load was released at 6750# and the second coupler was introduced. The first and second coupler slipped 10,125# and was allowed to drop 1/4". The load was released at 11,125#. The third coupler was introduced and the assembly reloaded. No slippage occurred until failure took place in the horizontal member, i.e., the horizontal pipe, at 21,750#. The assembly then jammed and the first coupler failed in the hinge pin at approximately 20,000#.

Universal TECHNICAL TESTING LABORATORIES, INC. · Post Office Box 372, Collingdale, Pa. 19023 · (215) LUdlow 6-3070

It should be pointed out that the above took place utilizing 2" Sch. 40 Pipe with a galvanized finish and distortion took place in both the vertical and horizontal pipe at approximately 18,000#.

In summary, it can be noted that the piping utilized in this compression test initiated failure before the couplers did and that, at the very least, distortion in the piping occurred slightly ahead of distortion in the couplers.

Also, it must be noted that since this compression test simulates the loading in a scaffold much more closely than a tensile test, we consider these results to be much more valid.

Sincerely,

UNIVERSAL TECHNICAL TESTING LABS.,INC.

Michael C. Modes

Michael C. Modes
Metallurgical Engineer

MCM:meb

DEPARTMENT OF THE NAVY
PHILADELPHIA NAVAL SHIPYARD
PHILADELPHIA, PA. 19112

IN REPLY REFER TO
Code 510
4 Aug 77

From: LCdr Edward L. Burgess, SC, USN, 3100/266-58-6352
To: Commander (Code 022), Naval Supply Systems Command, Washington, DC 20376

Subj: Mr. Constantine N. Polites' protest of Naval Supply Center, Puget Sound Solicitation N00406-77R-0381 for Scaffold Couplers

Ref: (a) COMNAVSUPSYSCOM ltr of 27 Jul 77

1. Upon receipt of reference (a), Mr. Constantine N. Polites asked for verification of the statements attributed to me in attachment (18) of enclosure (1) to reference (a).

2. In order to provide clarification of the statements in attachment (18), the following additional statement is submitted:

Even though the Philadelphia Naval Shipyard's Production Shops are not completely satisified with Mr. Polites' couplers and would prefer to use couplers from other manufacturers, there is no intent not to purchase his couplers as long as they meet all reasonable requirements and specifications developed by the Shipyard. Mr. Polites' couplers will be considered with all other couplers and purchase order awards will be on the basis of price, availability and meeting of specifications. His couplers are currently performing on the whole satisfactorily and appear to be capable of meeting the majority of the Shipyard's future needs.

E. L. BURGESS

Copy to:
Constantine N. Polites & Company
833 Guenther Avenue
Yeadon, PA 19050

MEMORANDUM FOR FILE
(NAVMAT NSC 4200/29 (11-67))

FILE NUMBER
77-R-0381

DATE	REMARKS (215)755-3444,3383 AV 443-3383
6/30/77	RECORD OF FONECON: Between LCDR Ed Burgess, Code 510, and Mr. John Sliden, Code 383.1 (AV 443-3273) Philadelphia Naval Shipyard and Mr. Carlson(NSCPS) This conversation was initiated to determine the actual extent to which Philadelphia Naval Shipyard is using couplers provided by Constantine N. Polites. Mr. Sliden is on the technical end and LCDR Burgess was PCO at Philadelphia while the previous protest was before the GAO. LCDR Burgess stated that there are relatively small quantities of Mr. Polites' couplers in the Yard and that they were purchased early on in Mr. Polites' attention to the Shipyard prior to actual experience with the couplers. Difficulties that have arisen with this coupler range from bolts that sheared or were not of standard length to poor seating of the nut in the cap to hair-line cracks in the forgings. Mr. Sliden stated that the Polites coupler is not in general use in the Shipyard and given a choice, it would not be used at all. They are being used as a stopgap measure while the procurement of couplings by NSC Norfolk is held up in a GAO protest. As soon as material is received from the NSC Norfolk contract, the Polites material will be phased out. With regard to the Polites material, Mr. Sliden states that "No one likes it and no one feels safe around it."

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

3 1981

Mr. Constantine N. Polites
Constantine N. Polites & Co.
833 Guenther Avenue
Yeadon, Pennsylvania 19050

Dear Mr. Polites:

This is in response to your letter of November 2, 1981, concerning OSHA requirements for tube and coupler scaffolds.

The Occupational Safety and Health Administration Construction Regulations do not specify the slippage capacity required for tube and coupler bearer couplers. However, to carry the maximum allowable load (75 p.s.f.), using the maximum allowable working surface (6.5' x 6.5') with the required safety factor of four for a uniformly distributed load, each coupler would be required to support 3200 lbs.

If I may be of further assistance, please call or write.

Sincerely,

John K. Botte
Chief, Division of Occupational
Safety Programming